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In The

Supreme Court of the United States

U. S. BANCORP AND SUBSIDIARIES,

Petitioners,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state retroactively applies a tax regulation as far back as eight years before the regulation was promulgated, does the state violate the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the case caption.

RULE 29.6 STATEMENT

U.S. Bancorp is a publicly traded corporation. No parent corporation or publicly held corporation owns 10 percent or more of U.S. Bancorp's stock.

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PETITION FOR A WRIT OF CERTIORARI

U.S. Bancorp and Subsidiaries ("Bancorp") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon in this case.

DECISIONS BELOW

The December 16, 2004, opinion of the Supreme Court of the State of Oregon is reported at 103 P.3d 85 (Or. 2004), and is reprinted in Appendix A. The court's February 1, 2005, order allowing petition for reconsideration and correcting opinion is not reported and is reprinted in Appendix D. The court's appellate judgment, entered March 8, 2005, is not reported and is reprinted in Appendix B. The September 19, 2001, opinion of the Oregon Tax Court is reported at 15 Or. Tax 375 (2001), and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The Oregon Supreme Court issued its opinion on December 16, 2004. On February 1, 2005, the court issued its order allowing petition for reconsideration and amending opinion. This petition for writ of certiorari is timely in that petitioners have filed it within 90 days of February 1, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Relevant portions of the Oregon statutes and regulations that were in effect during the periods in question are set forth in Appendix E.

STATEMENT OF THE CASE

This case involves a severe retroactive application of a legislative tax regulation to a limited class of taxpayers without reasonable justification. The Oregon Department of Revenue ("Department") requires unitary corporations doing business within and without the state to calculate income allocable to Oregon under the apportionment method of reporting.[1] The Department requires financial organizations like Bancorp to use three equal weight factors under the apportionment method – payroll, property, and gross

[1] The apportionment method determines the percentage of a unitary taxpayer's net income that is fairly attributable to Oregon. The formula ascribes dollar values to three aspects of a taxpayer's business: sales, property, and payroll. Each of these factors is expressed as a fraction – the numerator is the Oregon portion of the factor and the denominator is the total value of the factor. The three fractions are then totaled and divided by three. The resulting fraction or percentage is multiplied by the taxpayer's net income to determine the amount of income subject to tax in Oregon. *See, e.g.*, Or. Rev. Stat. § 314.650 (1987).

revenue. During the tax years at issue (1988 through 1992), the Department's rules stated that the property factor consisted of only real and tangible personal property used in the taxpayer's business.

After Bancorp complied with the Department's rules and included only real and personal (but not intangible) property in determining and paying the tax due, in December 1995, the Department amended its rules so that it could require financial organizations to include additional factors – including intangible property – in the apportionment formula. The Department claimed that the rule change was required by a decision of the Oregon Supreme Court. In 1998, the Department, applying its new 1995 amendment, audited Bancorp's corporate excise tax returns for the tax years 1984 through 1992. The Department gave retroactive effect to the 1995 amendment under a Department rule that allows it to apply any regulation to all tax years that remain open to examination. At the time, Bancorp's tax returns from 1984 through 1992 were open to examination because it had entered into agreements with the Internal Revenue Service to extend the time to assess federal taxes.

In July 1999, the Department issued notices of deficiency to Bancorp totaling $9,199,993.69 for Bancorp's 1988 through 1992 corporate excise tax returns. The notices of deficiency reflected taxes of $5,231,342 and interest of $3,968,651.69 largely attributable to the newly required inclusion of intangible personal property in the property factor of the apportionment formula. Although Bancorp had properly calculated and paid its corporate excise taxes in accordance with the rules in effect from 1988 through 1992, the Department, without any legislative or judicial mandate, retroactively applied its 1995

amendment to Bancorp's 1988 through 1992 tax returns, and assessed the additional taxes and interest based on that amendment.

The decision below sustaining the Department's retroactive application of the 1995 amendment is incompatible with controlling decisions of this Court. Although this Court has permitted retroactive application of tax statutes, the Court has stated that the statutes must be supported by a legitimate purpose and that the period of retroactivity must be brief. The regulation at issue here violates both of these precepts because the Department gave extreme retroactive effect to the regulation and did so without any sound justification. The regulation is especially problematic because the Department applies it only to a limited class of persons (i.e., taxpayers who have open tax years), which results in disparate treatment of similarly situated taxpayers. If left undisturbed, the decision below will encourage other states to give retroactive effect to tax laws and to reassess tax liabilities that should remain settled. Review of the decision below is plainly warranted.

1. Bancorp's Business.

Bancorp is a financial holding company based in Minneapolis, Minnesota. Bancorp is the parent company of several companies, the most prominent being U.S. Bank National Association, which is engaged in the business of retail and commercial banking in 24 states, including Oregon. During the period relevant to this dispute (1988-1992), Bancorp was based in Portland, Oregon.

2. Oregon's Taxing Scheme.

Oregon imposes an excise tax on corporations for the privilege of conducting business within the state. In 1965, Oregon adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA"), which governs state taxation of corporations engaged in business in multiple states. Or. Rev. Stat. §§ 314.605-314.675 (1965). Oregon, however, excludes financial organizations (like Bancorp) and utilities from coverage under UDITPA. Bancorp's net income for purposes of determining its corporate excise tax in Oregon is instead determined under Or. Rev. Stat. § 314.280. For the tax years in question, 1988 through 1992, § 314.280 provided, in pertinent part:

> (1) If a taxpayer has income from business activity as a financial organization . . . which is taxable both within and without this state . . . the determination of net income shall be based upon the business activity within the state, and the department shall have power to permit or require either the segregated method of reporting or the apportionment method of reporting, under rules and regulations adopted by the department, so as fairly and accurately to reflect the net income of the business done within the state.

Pursuant to the legislative grant of authority in § 314.280, the Department promulgated rules governing methods of income reporting for taxpayers subject to that statute. The Department required that unitary financial organizations use the apportionment method of reporting when they conduct business both within and without the state. *See* Or. Admin. R. 150-314.280-(C) (1987) (adopting the UDITPA rules). The Department also issued rules governing the apportionment and allocation of the net income of financial organizations. Or. Admin. R. 150-314.280-(A)

through (M) (1987). These rules required that the income of a unitary financial organization "shall ordinarily be apportioned to this state by giving equal weight to three factors ... payroll, property, and gross revenue." Or. Admin. R. 150-314.280-(E) (1987). The regulation further provided that "'[p]roperty' means real and tangible personal property used in the business."

The Department's regulations permitted a departure from the allocation and apportionment provisions of Or. Admin. R. 150-314.280-(E) only if they "do not fairly represent the extent of the taxpayer's business activity in this state *and* result in the violation of the taxpayer's rights under the Constitution of this state or of the United States." Or. Admin. R. 150-314.280-(M) (1987) (emphasis added). If both conditions were present, "the taxpayer may petition for and the department may permit, or the department may require ... [t]he inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the state." *Id.*

Bancorp filed its Oregon corporation excise tax returns for the tax years 1988 through 1992 in accordance with the rules and regulations in effect at the time and paid the tax due. As relevant to this dispute, Bancorp calculated the property factor of the apportionment formula based on its real and tangible personal property (but not intangible property) as mandated by the Department's regulations.

3. The Department Amends Its Tax Regulations in 1993 and Applies Them Prospectively.

In 1993, the Department amended Or. Admin. R. 150-314.280-(E) to provide that the property factor for financial organizations shall be modified as set forth in Or. Admin. R. 150-314.280-(N), which defines property as "the taxpayer's real property, tangible personal property, loans and credit card receivables." Or. Admin. R. 150-314.280-(N)(5)(a) (1993). The regulation expressly states that it applies only to tax years "beginning on or after January 1, 1993." Or. Admin. R. 150-314.280-(N)(1) (1993). In accordance with the regulatory modification, Bancorp included its loans and credit card receivables in the property factor of the apportionment formula for all tax years beginning on or after January 1, 1993.

In July 1995, the Oregon Supreme Court issued *Fisher Broadcasting, Inc. v. Department of Revenue*, 898 P.2d 1333 (Or. 1995), which invalidated certain aspects of the regulations issued under Or. Rev. Stat. § 314.280. *Fisher Broadcasting* concluded that the Department had exceeded its authority when it incorporated UDITPA's presumption in favor of the apportionment method of reporting into the rules promulgated under Or. Rev. Stat. § 314.280. Because the Oregon Legislature had specifically excepted financial institutions and utilities from UDITPA, the court reasoned that the legislature had intended that these taxpayers be given the flexibility to use the most accurate method of reporting, rather than be forced to

prove that the apportionment method was inaccurate. 898 P.2d at 1341.[2]

4. The Department Amends Its Tax Regulations in 1995 and Applies Them Retroactively in Its 1998 Audit.

In December 1995, the Department amended Or. Admin. R. 150-314.280-(M), purportedly in response to *Fisher Broadcasting*. Although *Fisher Broadcasting* did not address the Department's selection of apportionment factors or its ability to deviate from its rules on a case-by-case basis, the Department nevertheless amended its rules to give it greater power to require alternative methods of apportionment, claiming that *Fisher Broadcasting* compelled the amendment. The amended version of Or. Admin. R. 150-314.280-(M) (1995) eliminated the requirement that the apportionment provisions had to result in a violation of the taxpayer's constitutional rights before the Department could deviate from its ordinary apportionment factors. As amended in December 1995, under Or. Admin. R. 150-314.280-(M)(2) (1995) the Department requires a different method of apportionment if it determines that the "allocation and apportionment provisions of [Or. Admin. R.] 150-314.280-(A) to 150-314.280-(N) do not

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[2] The court also concluded that the Department's incorporation of the UDITPA regulations into the regulations under Or. Rev. Stat. § 314.280 was improper because it "utilized a standard that shifted the focus of [Or. Rev. Stat. §] 314.280(1) away from the *fair and accurate* reflection of a reporting taxpayer's *net income* (as required by that statute) to whether the reporting method *fairly* represented the taxpayer's *business activity* in the state and promoted *uniformity* of tax reporting among UDITPA jurisdictions." *Fisher Broadcasting*, 898 P.2d at 1338.

accurately and fairly reflect the net income of the business done within Oregon." This aspect of the amendment is neither responsive to nor required by *Fisher Broadcasting*.

In 1998, the Department audited Bancorp's corporate excise tax returns for tax years 1984 through 1992. Based on the 1995 amendment to Or. Admin. R. 150-314.280-(M)(2), the Department required Bancorp to include intangible personal property in the property factor of the apportionment formula for its excise tax returns from 1988 through 1992. By including intangible personal property in the property factor, the Department significantly increased the percentage of Bancorp's property attributable to Oregon. In July 1999 – more than ten years after the close of the first tax year in question – the Department issued notices of deficiency of taxes and interest against Bancorp for the 1988 though 1992 tax years in the amount of $9,199,993.69. To invoke the tax court's jurisdiction, Bancorp paid the additional taxes and interest to the department.

5. The Proceedings Below.

In February 2001, Bancorp filed suit in the Oregon Tax Court for a refund of taxes and interest. Bancorp contended that for the tax years at issue, the property factor of the apportionment formula included only real and tangible personal property, and that the Department had failed to identify any authority that would allow it to alter its own standard apportionment formula. On Bancorp's motion for partial summary judgment, the tax court ruled that the Department's rules in effect from 1988 through 1992 prohibited it from including Bancorp's intangible personal property in the apportionment formula

for those tax years. The tax court also concluded that Or. Admin. R. 150-314.280-(M) (1995) could not be applied retroactively. Based on these conclusions, the tax court entered judgment in favor of Bancorp, awarding it a refund of the taxes and interest paid to the Department.

The Department appealed the tax court's judgment to the Oregon Supreme Court, contending that the tax court erred in ruling that Or. Admin. R. 150-314.280-(M) (1995) could not be applied to the tax years in question. The Department maintained that because those tax years remained open to examination, the application of its 1995 legislative rule change to Bancorp's 1988-1992 tax returns was not retroactive.[3] In response, Bancorp argued that the Department was seeking to apply the rule retroactively, and that it lacked authority to do so. Bancorp also argued that retroactive application of the 1995 rule to its 1988 through 1992 tax returns violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Oregon Supreme Court issued an opinion on December 16, 2004, reversing the judgment of the tax court. *U.S. Bancorp v. Dept. of Rev.*, 103 P.3d 85 (Or. 2004). The court ruled that the Department had given retroactive effect to Or. Admin. R. 150-314.280-(M) (1995) but that it was permitted to do so under Oregon law and the United States Constitution. In rejecting Bancorp's due process argument, the court concluded that this Court's decisions

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[3] The Department argued for retroactive effect to the 1995 amendment under Or. Admin. R. 150-305.100-(B) (1986), which provides that "[a]dministrative rules adopted by the department, unless specified otherwise by statute or by rule, shall be applicable for all periods open to examination."

in *United States v. Carlton*, 512 U.S. 26 (1994), and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), permitted the department to apply the 1995 regulation to the tax years in question. *See U.S. Bancorp*, 103 P.3d at 640 ("Based upon that precedent, together with the fact that the rule at issue applied to only tax years still open to examination, we conclude that application of [Or. Admin. R.] 150-314.280-(M) (1995) to the tax years at issue would not violate the requirements of due process.").

On February 1, 2005, the Oregon Supreme Court issued an order allowing Bancorp's petition for reconsideration in some respects, but otherwise denying the petition. The court issued an appellate judgment on March 8, 2005, stating that "[t]he decision of the Tax Court is reversed in part and affirmed in part, and the case is remanded to the Tax Court for further proceedings."

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari for four principal reasons. First, the decision of the Oregon Supreme Court conflicts with *Carlton* as well as with other decisions of the Court. Sup. Ct. R. 10(c). In this case, the State of Oregon has given severe retroactive effect to a change in its tax regulations without legitimate justification and in a manner that targets a limited class of taxpayers. Given the lengthy period of retroactivity, the absence of any sound justification for the amendment itself (let alone for its retroactive application), and the discriminatory effect of applying the regulation to only a select group of taxpayers, the state has run afoul of the

due process clause as interpreted in this Court's decisions.

Second, the decision of the Oregon Supreme Court in this case stands in direct conflict with a decision of the highest court of another state. Sup. Ct. R. 10(b). In *Rivers v. State*, 490 S.E.2d 261 (S.C. 1997), the South Carolina Supreme Court interpreted *Carlton* to invalidate the retroactive application of tax legislation to tax years two to three years before the legislation was enacted. The Court should review the decision below to resolve the conflict between the highest courts of two states on this important federal issue.

Third, review is warranted because it would provide an opportunity to settle the law on the constitutionality of retroactive tax laws. Sup. Ct. R. 10(c). The Court's 1994 decision in *Carlton*, which is its latest statement on the issue, is open to differing interpretations as evidenced by the state court decisions in *Rivers* and in this case. On the one hand, *Carlton* contains broad statements suggesting that retroactive tax legislation is constitutional so long as it is rationally related to the purpose of raising revenue. On the other hand, *Carlton* applied a more exacting review of the legislation at issue, giving careful scrutiny to the period of retroactivity in light of the government's rationale for giving retroactive effect to the legislation. Given that *Carlton* is capable of various interpretations and that the Court has not defined the outer boundaries of acceptable retroactivity, review of the decision below presents an opportunity for the Court to settle an important issue of federal law.

Fourth, if the decision below is allowed to stand, state and local taxing authorities will be encouraged to give

retrospective effect to tax legislation and regulations in an effort to increase revenues. In contrast to Congress, which has generally limited retroactivity of revenue statutes to brief periods, state and local authorities have been willing to give greater retroactive effect to tax statutes and regulations, as the State of Oregon did in this case. If the decision below is not reviewed, it will undermine constitutional restraints on retroactive taxation.

I. The Decision Below Conflicts With Decisions of This Court.

A. This Court has not permitted retroactive application of tax statutes beyond brief periods, and its decisions suggest that such application would violate the Due Process Clause.

This Court has concluded that retroactive tax statutes do not violate the Due Process Clauses of the Fifth and Fourteenth Amendments if the purpose in enacting the law is neither illegitimate nor arbitrary and if the period of retroactivity is modest. *Carlton*, 512 U.S. at 32; *see also United States v. Darusmont*, 449 U.S. 292, 297 (1981) ("The Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not per se violate the Due Process Clause of the Fifth Amendment."); *United States v. Hemme*, 476 U.S. 558, 568-69 (1986) ("[T]his Court has since made clear that some retrospective effect is not necessarily fatal to a revenue law. . . . [W]e must 'consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional

limitation.'") (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).

Carlton arose when Congress passed a statute in 1986 that "granted a deduction for half of the proceeds of 'any sale of employer securities by the executor of an estate' to 'an employee stock ownership plan.'" 512 U.S. at 28 (quoting 28 U.S.C. § 2057(b)). Carlton, as executor of an estate, purchased MCI Communications common stock and sold it to the MCI employee stock ownership plan two days later at a loss of $631,000. When Carlton filed the estate tax return in December 1986, he claimed a deduction for half the proceeds of the sale of the MCI stock, which reduced the estate tax by $2,501,161.

In January 1987, the Internal Revenue Service announced that it would treat the § 2057 deduction as available only to estates that owned the securities immediately before the date of death. A bill to enact such an amendment was proposed in February 1987, and Congress enacted the amendment to § 2057 in December 1987. The 1987 amendment was given an effective date of October 1986 as if it had been part of the original statute. As a consequence of the 1987 amendment, the IRS disallowed the deduction claimed by Carlton and assessed additional taxes against the estate.

In addressing Carlton's claim that the 1987 amendment violated due process, the Court stated that retroactive tax legislation is constitutional provided that it "'is supported by a legitimate legislative purpose furthered by rational means[.] . . . The retroactive aspects of legislation, [however], as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.'" *Id.* at 30-31 (quoting

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984)).

With that framework in place, the Court analyzed the constitutionality of the 1987 amendment to § 2057. The Court first determined that "Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." 512 U.S. at 32. Although Congress could have chosen to give only prospective effect to the amendment, the Court concluded that it was reasonable for Congress to have prevented the revenue loss by applying the amendment to taxpayers who had made "purely tax-motivated stock transfers." *Id.*

Next, the Court noted that "Congress acted promptly and established only a modest period of retroactivity." *Id.* The Court remarked that Congress has frequently given revenue statutes effective dates prior to the date of enactment, but that "[t]his 'customary congressional practice' generally has been 'confined to short and limited periods required by the practicalities of producing national legislation.' *Id.* at 33 (quoting *Darusmont*, 449 U.S. at 296-97). The 1987 amendment to § 2057 fit within this narrow window because "the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year" and "the amendment was proposed by the IRS in January 1987 and by Congress in February 1987, within a few months of § 2057's original enactment." *Id.* Because Congress had a legitimate purpose for giving retroactive effect to the amendment to § 2057 *and* because the period of retroactivity was quite brief, the Court concluded that "the amendment as applied to Carlton's

1986 transactions is consistent with the Due Process Clause." *Id.* at 35.

In a concurring opinion, Justice O'Connor wrote that a period of retroactivity that reaches beyond the prior legislative session would not likely pass constitutional muster:

> In every case in which we have upheld a retroactive federal tax statute against due process challenge, . . . the law applied retroactively for only a relatively short period prior to enactment. . . . *A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions.* But in keeping with Congress' practice of limiting the retroactive effect of revenue measures (a practice that may reflect Congress' sensitivity to the due process problems that would be raised by overreaching), the December 1987 amendment to § 2057 was made retroactive only to October 1986.

Carlton, 512 U.S. at 38 (O'Connor, J., concurring) (citations omitted) (emphasis added).

The Court has not addressed the constitutionality of retroactive tax legislation since *Carlton*. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), however, the Court upheld a challenge to a statute that required a former coal operator to fund an employee benefit plan (the "Coal Act") on the ground that the statute was excessively retroactive. The coal operator had been out of the coal business for nearly 30 years, yet the Coal Act required that the operator provide health benefits for its former employees based on agreements that it had signed 30 to 50 years earlier.

By a 5-4 vote, without a majority opinion, the Court held that the Coal Act was unconstitutional. The plurality opinion concluded that the assessment against Eastern violated the Takings Clause of the Fifth Amendment and did not address whether the Coal Act violated due process. *Id.* at 538. With respect to retroactivity, the plurality observed that while "Congress also may impose retroactive liability to some degree, particularly where it is 'confined to short and limited periods required by the practicalities of producing national legislation,'" the Court's decisions "have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29 (citations omitted).

In a concurring opinion, Justice Kennedy concluded that the application of the Coal Act to the former operator violated substantive due process. In reaching this conclusion, Justice Kennedy noted that "our law has harbored a singular distrust of retroactive statutes," and that the Court's "decisions treat due process challenges based on the retroactive character of the statutes in question as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation." *Id.* at 547-48 (Kennedy, J., concurring in the judgment and dissenting in part); *see also id.* at 549 ("In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute.").

B. The decision below represents a significant and unwarranted expansion of *Carlton* and other decisions of this Court.

Notwithstanding this Court's repeated statements that retroactive tax laws comport with the Constitution only if the period of retroactivity is brief, the Oregon Supreme Court ruled that the 1995 amendment to Or. Admin. R. 150-314.280-(M) could be applied to Bancorp's tax returns as far back as 1988 without violating due process. In reaching this conclusion, the Oregon Supreme Court has extended *Carlton* in a manner that is inconsistent with that opinion. This case differs from *Carlton* in three principal respects.

First and foremost, the period of retroactivity is far greater than in *Carlton* (or, for that matter, in any other case in which this Court had upheld retroactive tax legislation). In *Carlton*, the legislative amendment to § 2057 was proposed only a few months after the statute's original enactment, and the period of retroactivity chosen by the legislature only slightly exceeded one year. 512 U.S. at 33. In this case, by contrast, the period of retroactivity ranged from nearly eight years from the beginning of the first tax year at issue to approximately three years after the close of the last tax year. Given that "the degree of retroactive effect is a significant determinant in the constitutionality of a statute," *Eastern Enterprises*, 524 U.S. at 549 (Kennedy, J., concurring), the severe retroactive effect given to Or. Admin. R. 150-314.280-(M) (1995) is incompatible with due process.[4]

[4] It is of no consequence that this dispute involves a regulation rather than legislation. A state cannot avoid the strictures of the

(Continued on following page)

Second, the Department failed to offer any legitimate justification for amending Or. Admin. R. 150-314.280-(M) (1995) or for giving it retrospective effect. Unlike the amendment in *Carlton*, which was adopted by the legislature as a "curative measure" to an oversight in the original legislation, 512 U.S. at 31, the Department here offered no legitimate reason why it promulgated the 1995 amendment, let alone why retroactive application was justified. As discussed in the statement of the case, *infra*, the Department claimed that *Fisher Broadcasting* required it to amend Or. Admin. R. 150-314.280-(M), but *Fisher Broadcasting* did not mandate that the Department amend the rule in the manner that it did, and it certainly did not require the Department to apply the amendment retroactively.[5] Absent a legitimate justification for adopting the 1995 amendment *and* for applying it retroactively

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Constitution by the simple expedient of delegating legislative authority to an agency. Where, as here, the regulation is "legislative," as opposed to "interpretive," *see Equitable Sav. & Loan v. Dept. of Rev.*, 5 Or. Tax 661, 674 (1974), *aff'd*, 537 P.2d 538 (Or. 1975), there is no practical difference between legislation and a regulation. *Cf. American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 295 (1987) (Court evaluates "state taxation based upon its actual effect rather than its legal terminology"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (in analyzing constitutional restraints on state taxes, this Court "consider[s] not the formal language of the tax statute but rather its practical effect"). Indeed, if there is any distinction to be drawn between regulations and legislation, regulations should be subject to more exacting review because they can be implemented by unelected agency officials without the checks and balances attendant to the legislative process.

[5] In response to Bancorp's argument that the Department's 1995 amendment was not required by *Fisher Broadcasting*, the Oregon Supreme Court simply stated: "It is of no consequence whether taxpayer is correct in insisting that [Or. Admin. R.] 150-314.280-(M) (1995) provides the department with greater flexibility than the decision in *Fisher Broadcasting* mandates." *U.S. Bancorp*, 103 P.3d at 92.

to the period at issue, the amendment cannot be said to comport with due process as applied to Bancorp's 1988 through 1992 excise tax returns.

Third, the manner in which the 1995 amendment is given retroactive effect results in disparate treatment of similarly situated taxpayers. Whereas the amendment to § 2057 in *Carlton* applied to all taxpayers who made tax-motivated securities transfers, the amendment to Or. Admin. R. 150-314.280-(M) applies only to taxpayers who may happen to have tax years open to examination. Only because Bancorp had entered into a tolling agreement with the IRS was the Department able to apply the 1995 amendment to Bancorp's 1988 through 1992 tax returns. Had Bancorp not done so, the Department would have been foreclosed from applying the amendment to Bancorp just as it was foreclosed from applying it to other financial organizations with closed tax years. In this sense, the retroactive application of the 1995 amendment not only is arbitrary, but it also treats similarly situated taxpayers differently. *Cf. Eastern Enterprises*, 524 U.S. at 528-29 ("legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience").

Each of these factors, standing alone, is sufficient to show that the retroactive application of the 1995 amendment offends due process. When taken together, they leave no doubt that the Department violated Bancorp's due process rights by applying the amended version of Or. Admin. R. 150-314.280-(M) to Bancorp's excise tax returns from 1988 through 1992.

This conclusion is not altered by this Court's decision in *Romein*, 503 U.S. 181. *Romein* involved a due process challenge to Michigan legislation that had retroactive effect. In 1981, the Michigan Legislature enacted a statute that allowed employers to decrease workers' compensation benefits to injured employees who received compensation from other employer-funded sources. The statute did not specify whether it applied to workers who were injured before the statute's effective date, but General Motors and several other employers took the position that the statute allowed them to reduce benefits to those workers.

In 1985, the Michigan Supreme Court ruled that the 1981 statute should be applied to workers injured before the effective date of the statute. *Chambers v. General Motors Corp.*, 375 N.W.2d 715 (Mich. 1985). Based on that ruling, employers who had not reduced benefits to employees injured before the effective date demanded reimbursement from the employees. The Michigan Legislature responded by enacting a statute in 1987 that repudiated *Chambers* and which required employers who had reduced benefits to employees injured before the statute's effective date to reimburse the employees for the reduction in benefits. *Romein*, 503 U.S. at 184-85.

Petitioners filed suit, claiming that the 1987 statute violated the Due Process Clause and Contract Clause. In analyzing the due process claim, this Court noted that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process:' a legitimate legislative purpose furthered by

rational means." *Id.* at 191 (citation omitted). The Court concluded that the 1987 statute met that standard:

> The purpose of the 1987 statute was to correct the unexpected results of the Michigan Supreme Court's *Chambers* opinion. The retroactive repayment provision of the 1987 statute was a rational means of meeting this legitimate objective: It preserved the delicate legislative compromise that had been struck by the 1980 and 1981 tax laws[.] . . . Also, it equalized the payments made by employers who had gambled on the *Chambers* decision with those made by employers who had not. *Cf. United States v. Sperry Corp.*, 493 U.S. 52, 64-65 (1989) (legitimate to legislate retrospectively in order to ensure that similarly situated persons bear similar financial burdens of program).

503 U.S. at 191-92.

Rather than supporting the Oregon Supreme Court's conclusion that the 1995 amendment comported with due process, *Romein* further illustrates the constitutional deficiency in applying the 1995 amendment to Bancorp's 1988 through 1992 tax years. Although the Michigan statute and the 1995 amendment have similar periods of retroactivity, the similarities end there. In *Romein*, the Michigan Legislature enacted the 1987 statute to correct *Chambers* and to restore the balance struck in the original legislation. In this case, the Department has not offered – and cannot offer – any legitimate purpose for retroactively applying the 1995 amendment. In addition, the Michigan legislation had the effect of ensuring that similarly situated persons were treated alike, while the 1995 amendment produces the opposite effect by imposing

disproportionate burdens on taxpayers who happen to have open tax years.

Finally, from the perspective of the taxpayer, retroactive application of the 1995 amendment is far different than retroactive application of the Michigan legislation. In contrast to petitioners in *Romein*, who reduced benefits to their employees based on an aggressive interpretation of a statute, 503 U.S. at 192, it is undisputed that Bancorp paid its state excise taxes in accordance with the rules in effect at the time. The Department's decision to change its rules well after the fact, and to assess Bancorp with an additional several million dollars in taxes and interest based on that change, offends fundamental principles of due process.

II. The Decision Below Directly Conflicts With the Decision of Another State's Supreme Court.

This case also warrants review because the decision below stands in direct conflict with the decision of a court of last resort of another state. Sup. Ct. R. 10(b). In *Rivers*, 490 S.E.2d 261, individual taxpayers in South Carolina challenged a state statute that retroactively decreased their capital gains tax refunds. In June 1988, the South Carolina Legislature enacted legislation that decreased the capital gains tax rate for capital gains realized between January 1, 1987, and January 31, 1988. The legislature amended the statute in 1989 to make only capital gains realized before June 22, 1987, eligible for the rate decrease, and to provide for a refund of excess capital gains taxes to be paid in two equal installments. In 1991, the legislature "altered the 1989 Amendment by reducing by half the size of the refund each affected taxpayer would

receive." *Id.* at 262. As a result of the 1991 amendment, plaintiff taxpayers, who had realized capital gains on property sold before June 22, 1987, did not receive the second annual refund as provided in the 1989 legislation.

The South Carolina Supreme Court concluded that "the [1991] legislation violated due process because of its excessive retroactivity." *Id.* at 263. In reaching its decision, the court cited *Carlton* as well as several lower court decisions for the proposition that tax legislation with a period of retroactivity greater than one year is constitutionally suspect. *Id.* at 264. Because the 1991 legislation reached back between two and three years, the court ruled that it had transgressed the outer boundary of due process:

> In the present case, the retroactivity period of Act 171 [the 1991 legislation] far exceeds one year. In fact, depending on whether one calculates the retroactivity period back to the 1989 Amendment or to Act 658 of 1988, the period at issue is at least two years and possibly as long as three years. . . . To be sure, the government possesses considerable power to tax and to collect taxes from its citizenry, and retroactive tax legislation has long been accepted as an appropriate means for achieving certain revenue goals. At some point, however, the government's interest in meeting its revenue requirements must yield to taxpayers' interest in finality regarding tax liabilities and credits. That point has been reached in this case; under the facts and circumstances here, the retroactivity period is simply excessive.

Id. at 265 (footnote omitted).[6]

The decision below in this case cannot be reconciled with *Rivers*. In this case, the Oregon Supreme Court concluded that the 1995 amendment did not violate due process even though the period of retroactivity was more than twice as long as that in *Rivers*. Although *Rivers* acknowledged that "[i]n some instances, a lengthy period of retroactivity may be necessary to accomplish certain legislative ends," 490 S.E.2d at 265 n.4, there has been no showing in this case that any legislative or administrative purpose was served by applying the 1995 amendment to Bancorp's 1988 through 1992 tax returns. Because the courts of last resort in two states have issued conflicting decisions on an important federal issue, the Court should grant certiorari to resolve the conflict.

III. Review of the Decision Below Will Allow the Court to Settle the Law on the Constitutionality of Retroactive Tax Laws.

This Court should review the decision below to settle the law on the constitutionality of retroactive tax legislation and regulations. The Court's decision in *Carlton*, which is its most recent pronouncement on the issue, is capable of several interpretations. The *Carlton* analysis begins with a general statement that retroactive tax statutes comport with due process if they are "supported by a legitimate legislative purpose furthered by rational

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[6] *See also City of Modesto v. National Med, Inc.*, ___ Cal. Rptr. 3d ___, 2005 WL 629015 (Cal. Ct. App. Mar. 18, 2005) (2004 city business tax ordinance could not be applied to 1996 through 2000 tax years without violating due process).

means." 512 U.S. at 30-31 (quoting *R.A. Gray*, 467 U.S. at 729).

Despite this broad statement, the Court analyzed the retroactive application of the statute under a more rigorous standard that reflects the notion that "[r]etroactivity is generally disfavored in the law in accordance with 'fundamental notions of justice' that have been recognized throughout history." *Eastern Enterprises*, 524 U.S. at 532 (citation omitted). In concluding that the statutory amendment in question did not violate due process, *Carlton* focused on the fact that the amendment was necessary to correct a mistake in the original legislation and that Congress "acted promptly and established only a modest period of retroactivity." 512 U.S. at 32. Justice O'Connor's concurrence expressed the view that a period of retroactivity that extends before the legislative session preceding the amendment would present "serious constitutional questions." *Id.* at 38 (O'Connor, J., concurring).

The Court's statements in *Carlton* are open to differing interpretations. Taken literally, the rational basis test would effectively uphold all retroactive tax legislation against a due process challenge. Indeed, the Oregon Supreme Court relied on that relaxed standard in ruling that the 1995 amendment did not violate due process as applied to Bancorp's 1988 through 1992 excise tax returns. The more rigorous analysis applied by the majority in *Carlton*, however, appears to require a close nexus between the government's interest and the retroactive aspect of the statute, as well as a brief period of retroactivity. Under Justice O'Connor's view – which is consistent with language in *Darusmont*, *Hemme*, and *Welch* – a period of retroactivity extending beyond the prior legislative session

is constitutionally suspect irrespective of the government's interest.

Given the inherent tension in *Carlton*, this Court should accept review of this case in order to clarify the law regarding the constitutionality of retroactive tax laws. When considering retroactive tax legislation with a period of retroactivity of more than one year, it is not clear at what point the government's interest "give[s] way to the taxpayer's interest in finality and repose." *Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring). Review of the decision below would allow the Court to provide further guidance as to the circumstances under which retroactive tax legislation is permissible and would provide an opportunity for the Court to define the outer boundaries of acceptable retroactivity.

IV. If Allowed to Stand, the Decision Below Will Undermine Constitutional Restraints on Retroactive Taxation.

The decision below poses a threat to constitutional limitations on retroactive tax laws because it upheld a period of retroactivity greater than any approved by this Court, and did so without requiring the state to show a legitimate interest. The decision below opens the door for state and local taxing authorities to give retroactive effect to their laws by simply applying new or amended laws to all open tax years, even though no valid purpose exists for retroactive application. To prevent states and localities from further eroding constitutional safeguards against retroactive taxation, the Court should accept review of the decision below.

V. This Court Has Jurisdiction to Review the Decision Below.

The Oregon Supreme Court's judgment of March 8, 2005, states that the matter is "remanded to the Tax Court for further proceedings." Although the Department disputes whether there are issues left to be decided in the tax court, this Court has jurisdiction over the decision below whether or not any issues remain for resolution. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) ("There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts.").

The four categories set forth in *Cox* are summarized as follows: (1) cases in which resolution of the federal issue is conclusive or the outcome of further proceedings is preordained; (2) cases in which the federal issue will survive irrespective of the outcome of further proceedings; (3) cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case;" and (4) cases "where the federal issue has been finally decided in the state courts with further proceedings pending" in which the federal issue may be mooted and where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action[.] . . . In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been

finally determined by the state courts for purposes of the state litigation." *Cox*, 420 U.S. at 479-83.

This Court has jurisdiction under either the third or fourth *Cox* categories. The third category requires that the federal issue has been finally decided, with further proceedings on the merits in the state court to come, but in which review of the federal issue cannot be had. In this case, the due process issue was finally decided by the Oregon Supreme Court, and the case is in a posture that would make it difficult, if not impossible, to raise the issue again. If Bancorp prevails on remand to the tax court on state law issues, the constitutional issue would be rendered moot. If Bancorp loses on the merits, there is no vehicle that likely would allow it to again assert the due process issue. Although several of this Court's decisions have suggested that a litigant can keep a federal issue alive on remand by requesting reconsideration of the issue, Bancorp may not be able to do so. While the rules of the Oregon Tax Court permit a motion for reconsideration of its orders (TCR 80), it is unlikely on remand that the tax court will believe that it may reconsider an issue on which the Oregon Supreme Court has spoken. Because it is unlikely that Bancorp could reassert the due process issue in the tax court, the Oregon Supreme Court's decision is final under the third Cox category.

The decision below also satisfies the fourth category identified in *Cox*. This category is similar to the third category, in that it requires a final decision on the federal issue and that the federal issue may be mooted by further proceedings in state court. But the fourth category also requires that a reversal of the federal issue by this Court would preclude further litigation and that a refusal to immediately review the federal issue may "seriously erode

federal policy." *Cox*, 420 U.S. at 483. These elements are present here. If the Supreme Court were to reverse the decision below and determine that the 1995 regulation cannot be applied retroactively, there would be no need for any further proceedings. Additionally, a refusal to review the decision below would seriously erode federal policy. As set forth above, the Oregon Supreme Court's decision constitutes an unprecedented and unwarranted expansion of *Carlton* and other decisions of the Court regarding retroactive taxation. It is essential that the Court accept review at this juncture to address the degree to which a state can give retroactive effect to its tax laws. Unless quickly repudiated, the decision below will allow Oregon to continue applying its tax regulations in an extreme retroactive manner and will embolden other states to follow Oregon's lead. Under these circumstances, this Court should grant review of the decision below.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

337 Or. 625, 103 P.3d 85 (Or. 2004)

U.S. BANCORP and Subsidiaries, Respondent,

v.

DEPARTMENT OF REVENUE, Appellant.

(OTC 4531; SC S51013).

Supreme Court of Oregon,
En Banc.

Argued and Submitted Sept. 8, 2004.

Decided Dec. 16, 2004.

On review from the Oregon Tax Court.*

Jas. Jeffrey Adams, Assistant Attorney General, Salem, argued the cause for appellant. With him on the briefs were Hardy Myers, Attorney General, Mary H. Williams, Solicitor General, and Robert B. Rocklin, Assistant Attorney General.

Bruce L. Campbell, of Miller Nash LLP, Portland, argued the cause for respondent. With him on the briefs was Ryan R. Nisle.

CARSON, C.J.

This dispute concerns the Oregon corporate excise tax liability of U.S. Bancorp (taxpayer) for tax years 1988

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* 15 OTR 375, 2001 WL 1152834 (2001).

through 1992.[1] The primary question before us is whether, during the tax years at issue, the Department of Revenue (department) had authority to require taxpayer to depart from the rule prescribing the standard apportionment formula for financial organizations governed under ORS 314.280,[2] because that formula failed to provide an accurate reflection of taxpayer's net income from business done within Oregon.

The department assessed additional taxes against taxpayer for tax years 1988 through 1992 based upon its determination that inclusion of taxpayer's intangible personal property resulted in a more accurate apportionment of taxpayer's income to Oregon under ORS 314.280. Taxpayer appealed from those notices of deficiency to the Oregon Tax Court.

In the Tax Court, taxpayer first argued that ORS 314.280, and the rules that the department had promulgated pursuant to that statute, precluded the department

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[1] The parties have engaged in extensive litigation relating to taxpayer's Oregon corporate excise tax liability for the tax years 1984 through 1992. *See, e.g., U.S. Bancorp v. Dept. of Rev.*, 15 OTR 13, 1999 WL 177475 (1999); *US Bancorp v. Dept. of Rev.*, 13 OTR 84, 1994 WL 235462 (1994). This appeal concerns only a part of that litigation relating to tax years 1988 through 1992. Our discussion of the factual and procedural history of this case is limited to the history that is relevant to the issues before us.

[2] The legislature adopted the version of ORS 314.280 in effect during the relevant tax years in 1965. Or. Laws 1965, ch. 152, § 22. The text of that statute is set out at 337 Or. at 629-30, 103 P.3d at 87. The legislature did not amend ORS 314.280 again until 2001. Or. Laws 2001, ch. 933, § 1. Neither party contends, nor do we conclude, that the 2001 version of ORS 314.280 governs this dispute. Thus, unless noted otherwise, all references to ORS 314.280 in this opinion refer to the 1965 version of that statute.

from including taxpayer's intangible personal property in the apportionment computations for the tax years at issue. As relevant here, taxpayer also argued that the department's notices of deficiency for tax years 1988 and 1989 were time-barred because, according to taxpayer, the department had received notice of corrections to taxpayer's federal tax liability more than two years before the department had entered into an agreement with taxpayer that had extended the limitations period for those years. *See* ORS 314.410(3) (providing two-year period of limitations from notice of federal correction for department to issue notice of deficiency); ORS 314.410(6) (providing that parties may enter extension agreement before expiration of any period of time prescribed for giving of notice of deficiency); *see also generally* ORS 314.410(1) (providing that department generally has three years after return is filed to issue notice of deficiency). The department answered and filed a counterclaim, asserting an additional deficiency relating to the receipts factor of the apportionment formula.

On taxpayer's motion for partial summary judgment, the Tax Court concluded that the department lacked authority to include taxpayer's intangible personal property in the apportionment formula for tax years 1988 through 1992. *U.S. Bancorp v. Dept. of Rev.*, 15 OTR 375, 2001 WL 1152834 (2001). The case proceeded to trial on taxpayer's statute of limitations claim and the department's counterclaim. At trial, taxpayer conceded the department's counterclaim except as to its timeliness. As to taxpayer's statute of limitations claim, the Tax Court held that taxpayer bore the burden of proving that the parties' extension agreement was defective because the department had received notice of corrections to taxpayer's

federal tax liability more than two years before the parties had executed that agreement. Because taxpayer had failed to prove that fact, the Tax Court concluded that the extension agreement was valid and, consequently, that the department's notices of deficiency for 1988 and 1989 were timely.

The department appealed to this court, assigning error to the Tax Court's grant of taxpayer's motion for partial summary judgment. In a cross-assignment of error, taxpayer contends that the Tax Court erred by ruling that, as to taxpayer's statute of limitations claim, taxpayer bore the burden of proving when the department first received notice of corrections to taxpayer's federal tax liability for 1988 and 1989.

We review for errors of law, ORS 305.445, and discuss both the department's assignment of error and taxpayer's cross-assignment of error separately below. For the reasons that follow, we conclude that the Tax Court erred by holding that the department had lacked authority to include taxpayer's intangible personal property in the apportionment formula used to allocate taxpayer's income to Oregon under ORS 314.280 for tax years 1988 through 1992. We further conclude that the Tax Court correctly determined that taxpayer bore the burden of proving that the parties' extension agreement was defective because the department had received notice of corrections to taxpayer's federal tax liability more than two years before the parties had executed that agreement. Based upon those conclusions, we reverse the decision of the Tax Court in part and affirm it in part, and remand the case to that court for further proceedings.

DEPARTMENT'S ASSIGNMENT OF ERROR

To provide context for the facts and the parties' arguments respecting the department's authority to require taxpayer to utilize an alternative apportionment formula, we first provide background as to the statutory and regulatory framework that underlies this dispute. Taxpayer is a unitary financial organization that does business both in Oregon and in other states. *See* ORS 314.610(4) (defining "financial organization" for purposes of ORS 314.605 to 314.675). As a financial organization, it is excluded from the coverage of the Uniform Division of Income for Tax Purposes Act (UDITPA),[3] and, instead, its net income for purposes of the Oregon corporate excise tax is determined under ORS 314.280. *See* ORS 314.615 (excluding financial organizations with taxable income from both within and outside Oregon from UDITPA). During 1988 through 1992, the tax years at issue in this dispute, ORS 314.280 provided, in part:

> "(1) If a taxpayer has income from business activity as a financial organization * * * which is taxable both within and without this state * * * the determination of net income shall be based upon the business activity within the state, and the department shall have power to permit or require either the segregated method of reporting or the apportionment method of reporting, under rules and regulations adopted by the department, so as fairly and accurately to reflect the net income of the business done within the state.

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[3] UDITPA, ORS 314.605 to 314.675, is a uniform statute that the legislature adopted in 1965. Or Laws 1965, ch 152, §§ 20, 21. For a discussion of the goals of UDITPA, see generally *Twentieth Century-Fox Film v. Dept. of Rev.*, 299 Or. 220, 226-28, 700 P.2d 1035 (1985).

> "(2) The provisions of subsection (1) of this section dealing with the apportionment of income earned from sources both within and without the State of Oregon are designed to allocate to the State of Oregon on a fair and equitable basis a proportion of such income earned from sources both within and without the state. Any taxpayer may submit an alternative basis of apportionment with respect to the income of the taxpayer and explain that basis in full in the return of the taxpayer. If approved by the department that method will be accepted as the basis of allocation."

Pursuant to the authority that ORS 314.280 confers upon it, the department has adopted administrative rules governing methods of income reporting for taxpayers governed under that statute. For the tax years at issue, as is also true now, many of the department's rules promulgated under ORS 314.280 incorporated provisions of UDITPA or rules that the department had adopted to implement UDITPA. As pertinent here, OAR 150-314.280-(C) adopts by reference the UDITPA requirement that a taxpayer utilize the apportionment method of income allocation when the taxpayer's business activities in Oregon are part of a unitary business that is carried on both within and outside the state. OAR 150-314.280-(C) (incorporating OAR 150-314.615-(D)); OAR 150-314.615-(D) (requiring apportionment method in such circumstances). During the relevant tax years, the department also required financial organizations to apply a modified version of the UDITPA three-factor apportionment formula. *See generally Twentieth Century-Fox v. Dept. of Rev.*, 299 Or. 220, 224, 700 P.2d 1035 (1985) (describing operation of UDITPA three-factor apportionment formula). OAR 150-314.280-(E) (1987) provided, in part:

> "After deducting the nonapportionable income, the remainder shall *ordinarily* be apportioned to this state by giving equal weight to three factors.
>
> "For a financial organization, the three factors shall be payroll, property and gross revenue.
>
> "'*Property' means real and tangible personal property used in the business.*"[4]

(Emphasis added.) *See also* OAR 150-314.280-(F) (1987) (incorporating UDITPA methodology for determining "property factor" set out in ORS 314.655 and its related rules).

In addition to those provisions, during the relevant tax years, the department also imported restrictions from UDITPA that narrowly limited the department's authority to permit or require a taxpayer to deviate from standard methods of income reporting that the department had prescribed by rule under ORS 314.280. Under the rule adopting those limits, the department possessed authority to permit or require a taxpayer to utilize an alternative income reporting method only if the applicable standard method did not represent fairly the taxpayer's "business activity" in Oregon and resulted in a violation of the

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[4] The department amended OAR 150-314.280-(E) in 1990 to add paragraph numbering, but otherwise did not alter the text of that rule during the tax years at issue. In 1993, the department amended OAR 150-314.280-(E) to provide that financial organizations must apply the apportionment formula set out in OAR 150-314.280-(N). Both parties, however, recognize that OAR 150-314.280-(N) is inapplicable to this dispute because that rule expressly provides that it applies to only tax years beginning on or after January 1, 1993. *See* OAR 150-314.280-(N)(1) (so providing).

taxpayer's state or federal constitutional rights. Specifically, OAR 150-314.280-(M) (1987) provided, in part:

> *"If the allocation and apportionment provisions of OAR 150-314.280-(A) to 150-314.280-(L) do not fairly represent the extent of the taxpayer's business activity in this state and result in the violation of the taxpayer's rights under the Constitution of this state or of the United States,* the taxpayer may petition for and the department may permit, or the department may require, in respect to all or any part of the taxpayer's business activity:
>
> "(1) Separate accounting;
>
> "(2) The exclusion of any one or more of the factors;
>
> "(3) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
>
> "(4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income."

(Emphasis added.) *See also* ORS 314.670 (1987) (similarly restricting variation from standard apportionment provisions of UDITPA).

In 1995, this court issued its decision in *Fisher Broadcasting, Inc. v. Dept. of Rev.,* 321 Or. 341, 898 P.2d 1333 (1995). In that case, the taxpayer had challenged the validity of OAR 150-314.280-(I) (1983)[5] – the predecessor

[5] OAR 150-314.280-(I) was renumbered to OAR 150-314.280-(M) in 1987. OAR 150-314.280-(I) (1983) provided:

> "The provisions of OAR 150-314.670-(A) are by this reference incorporated herein and made a part of this OAR 150-314.280-(I)."

(Continued on following page)

rule to OAR 150-314.280-(M) (1987) – which similarly incorporated restrictions from UDITPA limiting the department's authority to permit or require deviation from the department's rules prescribing standard methods of income reporting under ORS 314.280. After reviewing the text and context of ORS 314.280, this court agreed with the taxpayer that the restriction against alternative

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OAR 150-314.670-(A) (1983), promulgated under the authority of UDITPA, provided, in part:

> "*ORS 314.670 provides that if the allocation and apportionment provisions of ORS 314.610 to 314.655 do not fairly represent the extent of the taxpayer's business activity in this state,* the taxpayer may petition for, or the Department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> "(1) Separate accounting;
>
> "(2) The exclusion of any one or more of the factors;
>
> "(3) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
>
> "(4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.
>
> "ORS 314.670 permits a departure from the allocation and apportionment provisions of [UDITPA] only in limited and specific cases. ORS 314.670 may be invoked only where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in [the UDITPA statutes]."

(Emphasis added.)

In 1984, the legislature amended ORS 314.670 to further restrict deviation from standard methods of income reporting under UDITPA by allowing alternative methods only when the presumptive methods would "result in the violation of the taxpayer's rights under the Constitution of this state or of the United States[.]" Or Laws 1984, ch 1, § 17. In 1999, the legislature removed that additional criterion from ORS 314.670. *See* Or Laws 1999, ch 143, § 9 (eliminating requirement that constitutional violation be established before alternative reporting methods may be utilized under UDITPA).

reporting methods set out in OAR 150-314.280-(I) (1983) was beyond the scope of the department's rulemaking authority under ORS 314.280. In reaching that conclusion, the court first observed that the legislature expressly had excluded certain taxpayers from the coverage of UDITPA and, in doing so, had demonstrated an intent to preserve for those taxpayers "the advantages of individual judgment and flexibility" that had existed under ORS 314.280. *Id.* at 353-55, 898 P.2d 1333. Because the department lacked authority to override that legislative choice, the court concluded that the department was not authorized to subject taxpayers covered under ORS 314.280 to the same restrictions against utilizing alternative methods of income reporting that existed for taxpayers governed by UDITPA. *Id.* at 355, 898 P.2d 1333. The court went on to observe that, even if the department had been authorized to limit its power in such a way, the UDITPA standard incorporated under OAR 150-314.280-(I) (1983) was incompatible with the text of ORS 314.280. Specifically, the court pointed out that, although ORS 314.280 directs the department to adopt reporting methods that "'*fairly and accurately* reflect the *net income* of the [taxpayer's] business done within the state[,]'" the UDITPA standard incorporated under OAR 150-314.280-(I) (1983) authorized the department to permit or require alternative reporting methods only when the standard method did not "'*fairly* represent the extent of the taxpayer's *business activity* in this state.'" *Id.* at 355, 898 P.2d 1333 (quoting ORS 314.280 and OAR 150-314.670 (1987)) (emphasis in *Fisher Broadcasting*). Thus, the court determined that OAR 150-314.280-(I) (1983) also was invalid because, contrary to the legislative mandate of ORS 314.280, that rule did not allow a taxpayer to challenge the application of a standard income reporting method upon the ground that it did not

result in an accurate reflection of the taxpayer's net income from business done within the state. *Id.* at 359, 898 P.2d 1333.

In 1995, in response to this court's decision in *Fisher Broadcasting*, the department amended the rule governing its authority to permit or require deviation from the department's rules prescribing methods of income reporting under ORS 314.280. The department's new rule provided that the department had authority to permit or require an alternative reporting method – including the use of an additional factor in an apportionment formula – whenever a standard method did not "fairly and accurately" reflect the taxpayer's net income from business done within Oregon. OAR 150-314.280-(M) (1995) provided, in part:

> "(1) For taxpayers that are taxable both within and without Oregon, the provisions of ORS 314.280 will ordinarily require apportionment to arrive at a fair and accurate measure of net income from business activity in Oregon. If the taxpayer can show that no unitary relationship exists between its business activities within Oregon and those activities outside Oregon, then taxpayer may use separate accounting.
>
> "(2) *If the allocation and apportionment provisions of OAR 150-314.280-(A) to 150-314.280-(N) do not fairly and accurately reflect the net income of the business done within Oregon, based on the taxpayer's business activity within Oregon,* the department may require or the taxpayer may request an alternative method of apportionment and the department may approve that method of apportioning all or any part of the net income from the taxpayer's business activity within Oregon:
>
> "* * * * * *

"(4) Examples of alternative methods of apportionment include:

"(a) The exclusion of any one or more of the factors;

"(b) *The inclusion of one or more additional factors which will fairly and accurately reflect the taxpayer's net income from business activity in Oregon*; or

"(c) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income."

(Emphasis added.)

With that background in mind, we turn to the facts of this case. Taxpayer filed its Oregon corporate excise tax returns for the years 1988 through 1992 by applying the standard three-factor apportionment formula that the department had prescribed for financial organizations at that time. *See* 337 Or. at 630-31, 103 P.3d at 88 (setting out OAR 150-314.280-(E) (1987)). Consistently with the definition of the "property" factor of that formula, taxpayer did not include intangible personal property in its apportionment computations. *See* OAR 150-314.280-(E) (1987) (defining "property" factor as "real and tangible personal property used in the business").

In 1998, the department audited taxpayer's tax returns for the years at issue and determined that inclusion of taxpayer's intangible personal property in the apportionment formula resulted in a more accurate allocation of taxpayer's net income to Oregon. Applying the 1995 version of OAR 150-314.280-(M), set out above, the department included taxpayer's intangible personal property in the apportionment calculation, and, based

upon that inclusion, it issued notices of deficiency against taxpayer for the five years at issue.

Taxpayer appealed from those notices of deficiency to the Oregon Tax Court. On taxpayer's motion for partial summary judgment, the Tax Court concluded that the department's rules precluded the department from including taxpayer's intangible personal property in the apportionment formula for the tax years at issue. *U.S. Bancorp*, 15 OTR at 379-80. The Tax Court also rejected the department's assertion that OAR 150-314.280-(M) (1995) applied to the disputed tax years, concluding that "that rule was not expressly made retroactive and therefore will not be applied by the court to the years in question." *Id.* at 380. Based upon those conclusions, the Tax Court granted summary judgment in favor of taxpayer and awarded taxpayer refunds for the years at issue.

As noted above, the department appealed the Tax Court's grant of taxpayer's summary judgment motion, asserting that the Tax Court erred in concluding that the department had lacked authority to include taxpayer's intangible personal property in the apportionment formula. Before this court, the parties' arguments focus upon the applicability of OAR 150-314.280-(M) (1995) to the years in question. Both parties agree that, if OAR 150-314.280-(M) (1995) governs this dispute, then the department had authority under that rule to include taxpayer's intangible personal property in the apportionment calculation.[6]

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[6] For purposes of its summary judgment motion, taxpayer does not dispute the department's averment that inclusion of taxpayer's intangible personal property results in a more accurate apportionment of its net income to Oregon.

Taxpayer, however, argues that applying OAR 150-314.280-(M) (1995) to the tax years at issue would amount to a "retroactive" application of that rule, and, according to taxpayer, the department did not manifest an intent for such an application in promulgating OAR 150-314.280-(M) (1995).[7] Taxpayer further contends that, if this court were to construe OAR 150-314.280-(M) (1995) as applicable to the tax years at issue, then that application would violate taxpayer's substantive due process rights under the federal constitution. We address each of taxpayer's arguments in turn below.

We first consider whether applying OAR 150-314.280-(M) (1995) to tax years 1988 through 1992 properly is characterized as a "retroactive" application of that rule. The department contends that, because the tax years at issue were open to examination, the application of OAR 150-314.280-(M) (1995) to those years would not constitute a "retroactive" application of that rule. As we understand its argument, the department appears to suggest that the application of a later-promulgated rule cannot be characterized as a "retroactive" application of that rule if the department retains authority to assess deficiencies against a taxpayer. We disagree with that assertion.

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[7] Before this court, taxpayer also argues that OAR 150-314.280-(M) (1995) is invalid because it exceeds the department's rulemaking authority under ORS 314.280. Before the Tax Court, however, taxpayer emphasized that it did not question the department's authority to promulgate OAR 150-314.280-(M) (1995), specifically asserting that "ORS 314.280(1) clearly gives the Department the authority to promulgate such a rule." As a result of that position in the Tax Court, we decline to exercise our discretion to address taxpayer's challenge to the department's authority to promulgate OAR 150-314.280-(M) (1995). *See Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or. 634, 658-60, 20 P.3d 180 (2001) (discussing "right for the wrong reason" doctrine).

This court previously has explained that, as a general matter, a retroactive legislative action is one that affects existing legal rights or obligations arising out of past transactions or occurrences. *Fromme v. Fred Meyer, Inc.*, 306 Or. 558, 561-62, 761 P.2d 515 (1988); *see also Whipple v. Howser,* 291 Or. 475, 488-89, 632 P.2d 782 (1981) (Linde, J., concurring) ("'Retroactivity' itself is a deceptively simple word for a complex set of problems. In real time, all laws can operate only prospectively, prescribing legal consequences after their enactment; they cannot change the past. On the other hand, all new laws operate upon a state of affairs formed to some extent by past events."). In this case, OAR 150-314.280-(M) (1995) did nothing to alter taxpayer's existing obligation under ORS 314.280 to allocate its net income to Oregon based upon business done within this state. Nevertheless, in light of the restriction set out in OAR 150-314.280-(M) (1987), we agree with taxpayer that it was entitled to presume that its maximum tax liability for the years at issue would be based upon the three-factor apportionment formula set out in OAR 150-314.280-(E) (1987). Because, under the circumstances here, OAR 150-314.280-(M) (1995) would authorize the department to increase that liability based upon the inclusion of an additional apportionment factor, we conclude that the application of that rule to taxpayer for the years at issue would impose new obligations with respect to past transactions and, therefore, properly is characterized as a "retroactive" application of that rule.

That conclusion, however, does not end our inquiry. As this court repeatedly has observed, retroactive application of a rule is not necessarily impermissible. *See Delehant v. Board on Police Standards,* 317 Or. 273, 278, 855 P.2d 1088 (1993) (so stating). Rather, in deciding whether to

apply a rule retroactively, we must discern the intent of the promulgating agency. *Id.; cf. Whipple,* 291 Or. at 480, 632 P.2d 782 ("[I]n determining whether to give retroactive effect to a legislative provision, it is not the proper function of this court to make its own policy judgments, but its duty instead is to attempt to 'discern and declare' the intent of the legislature."). To do so, we first consider the text and context of the rule at issue. *See generally Abu-Adas v. Employment Dept.,* 325 Or. 480, 485, 940 P.2d 1219 (1997) (in interpreting administrative rule, court first considers text and context of rule to discern intent of enacting body).

The text of OAR 150-314.280-(M) (1995) is silent as to whether the department intended that rule to apply retrospectively or, instead, to only tax years subsequent to its enactment. As we explain below, however, the context of that rule makes clear that the department intended OAR 150-314.280-(M) (1995) to operate retrospectively.

We first observe that the circumstances surrounding the promulgation of OAR 150-314.280-(M) (1995) suggest that the department intended that rule to apply retrospectively. As discussed previously, the department adopted OAR 150-314.280-(M) (1995) in direct response to this court's decision in *Fisher Broadcasting.* It is of no consequence whether taxpayer is correct in insisting that OAR 150-314.280-(M) (1995) provides the department with greater flexibility than the decision in *Fisher Broadcasting* mandates. Rather, the circumstances surrounding the department's promulgation of OAR 150-314.280-(M) (1995) offer insight into the department's intent, because those circumstances illustrate that the department adopted that rule in response to a judicial decision that, by declaring its

previous rule defective, had left in a gap in the department's existing regulatory framework under ORS 314.280.

We do not suggest that those circumstances, without more, establish that the department intended OAR 150-314.280-(M) (1995) to operate retrospectively. However, in this case, other rules in existence at the time that the department promulgated OAR 150-314.280-(M) (1995) confirm that view. As the department points out, OAR 150-305.100-(B) provides that "[a]dministrative rules adopted by the department, unless specified otherwise by statute or by rule, shall be applicable to all periods open to examination." Thus, at the time that it adopted OAR 150-314.280-(M) (1995), the department had expressed its intent to apply *all* tax regulations to all periods open to examination unless a particular statute or rule provides a contrary instruction. Because OAR 150-314.280-(M) (1995) does not do so, OAR 150-305.100-(B) directs us to apply that rule to the tax years in question.

Taxpayer seeks to avoid that result by arguing that OAR 150-305.100-(B) cannot inform our determination of the department's intent in promulgating OAR 150-314.280-(M) (1995) for two reasons. First, taxpayer asserts that the department intended OAR 150-305.100-(B) to apply to only new rules, rather than also to amendments to existing rules. Taxpayer, however, cites no authority to support that proposition, and we do not perceive such a distinction in the wording of OAR 150-305.100-(B).

Taxpayer also argues that, because the department promulgated OAR 150-305.100-(B) nine years before it promulgated OAR 150-314.280-(M) (1995), it "seems to defy logic" that OAR 150-305.100-(B) is relevant to determining the department's intent respecting the retrospective

application of that later-promulgated rule. We again disagree and, indeed, consider OAR 150-305.100-(B) relevant precisely because it provided a presumption of retroactive application to all periods open to examination at that time when the department promulgated OAR 150-314.280-(M) (1995). With such a presumption in place under the existing regulatory framework, the department had no need to express an intent respecting the retroactive operation of OAR 150-314.280-(M) (1995) unless it intended that rule to operate differently. Thus, we must infer from the lack of an instruction to the contrary that the department intended OAR 150-314.280-(M) (1995) to conform to the presumption set out in OAR 150-305.100-(B) and to apply to all periods open to examination.

In anticipation of that conclusion, taxpayer next argues that, even if the department intended OAR 150-314.280-(M) (1995) to operate retrospectively, that rule cannot apply to the tax years in question because such an application would violate taxpayer's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[8] To support that proposition, taxpayer relies upon the United States Supreme Court decision in *United States v. Carlton,* 512 U.S. 26, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994). In that case, the taxpayer had made a securities transaction to take advantage of an estate tax deduction that existed under the Internal

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[8] The Fourteenth Amendment provides, in part:

"No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law* * * *."

(Emphasis added.)

Revenue Code at that time. Almost a year later, Congress amended the tax code to eliminate that deduction retrospectively and, as a result of that amendment, the taxpayer no longer qualified for the deduction. *Id.* at 28-30, 114 S.Ct. 2018.

Before the Supreme Court, the taxpayer challenged the validity of the retroactive tax legislation upon substantive due process grounds. In considering the taxpayer's challenge, the Supreme Court clarified that retroactive economic legislation, including retroactive tax legislation, satisfies due process requirements so long as "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means[.]" *Id.* at 30-31, 114 S.Ct. 2018 (quoting *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 729-30, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984)) (internal quotation marks omitted). Applying that standard, the Court upheld the retroactive legislation against the taxpayer's due process challenge. In explaining that conclusion, the Court relied upon the facts that Congress had acted to cure a mistake in the original legislation and that "Congress had acted promptly and established only a modest period of retroactivity." *Carlton,* 512 U.S. at 32-33, 114 S.Ct. 2018.

In this case, we do not understand taxpayer to argue that the department's rule was enacted for an illegitimate purpose. Rather, as we understand taxpayer's challenge, taxpayer contends that application of OAR 150-314.280-(M) (1995) to the tax years in question would exceed the scope of permissible retroactivity. The Supreme Court, however, has upheld the retroactive application of economic legislative actions with comparable time periods. *See, e.g., General Motors Corp. v. Romein,* 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (six years). Based

upon that precedent, together with the fact that the rule at issue applied to only tax years still open to examination, we conclude that application of OAR 150-314.280-(M) (1995) to the tax years at issue would not violate the requirements of due process. Thus, for the reasons stated above, we conclude that the Tax Court erred by holding that the department lacked authority to include taxpayer's intangible personal property in the apportionment formula used to allocate taxpayer's income to Oregon under ORS 314.280 for tax years 1988 through 1992.

TAXPAYER'S CROSS-ASSIGNMENT OF ERROR

As previously described, 337 Or. at 627-28, 103 P.3d at 86-87, after the Tax Court granted taxpayer's summary judgment motion respecting the inclusion of taxpayer's intangible personal property in the apportionment formula, the case proceeded to trial on taxpayer's statute of limitations claim and the department's counterclaim relating to the receipts factor of the apportionment formula. At trial, taxpayer conceded the department's counterclaim on the merits but, as relevant here, asserted that that claim was time-barred for tax years 1988 and 1989. Specifically, taxpayer challenged the validity of the parties' agreement extending the limitations period for 1988 and 1989 upon the ground that the department had notice of corrections to taxpayer's federal tax liability more than two years before that extension agreement had been executed. *See* ORS 314.410(3) (providing two-year period of limitations from notice of federal correction for department to issue notice of deficiency); ORS 314.410(6) (providing that parties may enter extension agreement before expiration of any period of time prescribed for giving of notice of deficiency). After concluding that the evidence as

to that question was in "a position of equipoise[,]" the Tax Court rejected taxpayer's argument, because it determined that taxpayer bore the burden of persuasion under ORS 305.427[9] and that taxpayer had failed to satisfy that burden.

In a cross-assignment of error, taxpayer contends that the Tax Court erred by holding that taxpayer bore the burden of proving that the parties' extension agreement was invalid because the department had received notice of federal corrections to the 1988 and 1989 tax years more than two years before the parties' agreement had been executed. Based upon that argument, taxpayer asserts that, if this court concludes that the department had authority to include taxpayer's intangible personal property in the apportionment formula, then this court nevertheless should affirm that part of the judgment awarding taxpayer refunds and interest for the 1988 and 1989 tax years on statute of limitations grounds.

Before turning to the merits, we first address the department's contention that we are precluded from considering taxpayer's statute of limitations argument because taxpayer failed to raise that argument by way of a cross-appeal. This court previously has explained that a respondent who seeks only to sustain a judgment is not required to cross-appeal to assign error to a ruling of the

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[9] ORS 305.427 provides:

"In all proceedings before the judge or a magistrate of the tax court and upon appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in other civil litigation."

trial court. *Artman v. Ray,* 263 Or. 529, 533, 501 P.2d 63, 502 P.2d 1376 (1972). In this case, taxpayer expressly raised its statute of limitations argument only as an alternative ground for this court to affirm a part of the Tax Court judgment and, in doing so, waived any claim to additional relief that it might have been entitled to receive if this court were to rule in its favor on that issue.[10] Thus, taxpayer's proffered statute of limitations argument invokes the "right for the wrong reason" principle as a ground for affirming the Tax Court judgment and, as such, properly may be considered in the absence of a cross-appeal. *See generally Outdoor Media Dimensions Inc. v. State of Oregon,* 331 Or. 634, 659-60, 20 P.3d 180 (2001) (discussing "right for the wrong reason" principle for affirming trial court's ruling).

Having explained why it is properly before us, we now consider the merits of taxpayer's statute of limitations argument. Taxpayer does not dispute that the department's notices of deficiency for tax years 1988 and 1989 were timely under the parties' extension agreement. Instead, taxpayer challenges the validity of that agreement and,

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[10] The judgment from the Tax Court provides that, although taxpayer stipulated to judgment against it on the department's counterclaim without reservation of a right of appeal, the parties' stipulation provides that, "if [taxpayer] prevail[s] on an appeal of [its] statute of limitations claims for tax years 1988[and] 1989 * * * , then the case will be remanded to the Oregon Tax Court for a corrected judgment that, in addition to other possible relief, denies the [department] its counterclaim for 1988[and] 1989 * * * ." By electing not to cross-appeal, taxpayer has waived any claim to relief as to the department's counterclaim, even if it were to prevail in its statute of limitations claim, because such relief would require a modification of the Tax Court judgment. *See Booras v. Uyeda,* 295 Or. 181, 189, 666 P.2d 791 (1983) (failure to file cross-appeal precludes appellate court from considering argument as basis to modify judgment).

specifically, the Tax Court's determination that it bore the burden of proving that that agreement was defective. In making that challenge, taxpayer acknowledges that ORS 305.427 places the burden of persuasion upon the party seeking affirmative relief in Tax Court proceedings. *See* ORS 305.427 (so providing). It argues, however, that it is inequitable to apply that rule to its statute of limitations claim because, according to taxpayer, the department's record-keeping practices make it impossible for taxpayer to determine whether the Internal Revenue Service (IRS) had notified the department of corrections to taxpayer's federal tax liability more than two years before the parties had executed their agreement. For the reasons explained below, we reject taxpayer's argument.

As noted above, ORS 305.427 places the burden of persuasion upon the party seeking affirmative relief in Tax Court proceedings. We perceive no inequity from the application of that rule here because, as the Tax Court observed, ORS 314.380(2) (1995)[11] required taxpayer to notify the department of any corrections to taxpayer's federal tax liability at the time when those federal corrections were proposed. Although the IRS had issued a correction to taxpayer's 1988 and 1989 federal taxable income in June 1995, taxpayer does not dispute the Tax Court's finding that the parties had executed the extension

[11] ORS 314.380(2) (1995) provided, in part:

> "If the amount of a taxpayer's federal taxable income reported on a federal income tax return for any taxable year is changed or corrected by the United States Internal Revenue Service or other competent authority, resulting in a change in the taxpayer's net income which is subject to tax by this state, the taxpayer shall report such change or correction in federal taxable income to the department."

agreement within two years after taxpayer first notified the department of those federal corrections in February 1997. We agree with the Tax Court that "it is not equitable for taxpayer to plead for certainty but fail to take acts, required of it under ORS 314.380, which would produce such certainty and satisfy a statutory obligation." The Tax Court correctly determined that taxpayer had the burden to prove that the parties' extension agreement was defective and that taxpayer had failed to do so.

The decision of the Tax Court is reversed in part and affirmed in part, and the case is remanded to the Tax Court for further proceedings.

APPENDIX B

Filed: December 16, 2004

IN THE SUPREME COURT
OF THE STATE OF OREGON

U.S. BANCORP and SUBSIDIARIES,

Respondent,

v.

DEPARTMENT OF REVENUE,

Appellant.

(OTC 4531; SC S51013)

En Banc

On review from the Oregon Tax Court.*

Carl N. Byers, Senior Judge (summary judgment); Henry C. Breithaupt, Judge (trial).

Argued and submitted September 8, 2004.

Jas. Jeffrey Adams, Assistant Attorney General, Salem, argued the cause for appellant.

Bruce L. Campbell, of Miller Nash LLP, Portland, argued the cause for respondent.

CARSON, C.J.

The decision of the Tax Court is reversed in part and affirmed in part, and the case is remanded to the Tax Court for further proceedings.

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* 15 OTR 375 (2001).

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant
[X] Costs allowed, payable by: Respondents

APPELLATE JUDGMENT
and
SUPPLEMENTAL JUDGMENT

MONEY AWARD

Judgment #1

Creditor(s):	Department of Revenue
Attorney:	Jas. Jeffrey Adams 400 Justice Building 1162 Court NE Salem, OR 97301
Debtor(s):	U.S. Bancorp and Subsidiaries
Attorney:	Bruce L. Campbell
Costs:	$ 704.57
Attorney fees:	$ -0-
TOTAL AMOUNT:	$ 704.57

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: March 8, 2005

SUPREME COURT
(seal)

APPENDIX C

15 OTR 375

IN THE OREGON TAX COURT
REGULAR DIVISION

U.S. BANCORP
and Subsidiaries,
Plaintiff,

v.

DEPARTMENT OF REVENUE,
Defendant.

(TC 4531)

Oral argument on Plaintiff's Motion for Partial Summary Judgment was held June 6, 2001, in the courtroom of the Oregon Tax Court, Salem.

William S. Manne, Miller Nash, Portland, filed the motion and argued the cause for Plaintiff (taxpayer).

James C. Wallace, Assistant Attorney General, Department of Justice, Salem, argued the cause for Defendant (the department).

Decision for Plaintiff rendered September 19, 2001.

CARL N. BYERS, Senior Judge.

Plaintiff (taxpayer) appeals the assessment of additional corporate excise taxes for 1984 through 1992. The additional taxes are attributable to Defendant Department of Revenue (the department) including intangible personal property in the property factor of the apportionment formula. Taxpayer moves for partial summary judgment on the ground that as a matter of law, the department has

no authority to include intangibles. The court has considered the written and oral arguments of the parties.

FACTS

Taxpayer is a unitary financial organization doing business in Oregon and in other states. Its net income is determined under ORS 314.280(1),[1] which states:

> "If a taxpayer has income from business activity as a financial organization * * * which is taxable both within and without this state * * * the determination of net income shall be based upon the business activity within the state, and the department shall have power to permit or require either the segregated method of reporting or the apportionment method of reporting, under rules and regulations adopted by the department, so as fairly and accurately to reflect the net income of the business done within the state."

The department has exercised its delegated power and adopted a number of administrative rules. Most of those rules incorporate by reference rules adopted to implement the Uniform Division of Income for Tax Purposes Act (UDITPA). For example, OAR 150-314.280-(C) adopts by reference OAR 150-314.615-(A). If a taxpayer has business activity both within and without the state of Oregon, the latter rule indicates that the first step is to determine which portion of its income is business income. The rule then indicates that business income is apportioned according to the usual three-factor

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[1] All references to the Oregon Revised Statutes are to 1989.

formula. OAR 150-314.615-(D), also incorporated by reference, indicates that "[w]here the taxpayer's Oregon business activities are part of a unitary business carried on both within and without the state, use of the apportionment method is mandatory * * *."

OAR 150-314.280-(E) specifically addresses financial organizations. Subparagraph (2) provides that for a financial organization, the three factors shall be payroll, property, and gross revenue. Subparagraph (3) defines "property" as "real and tangible personal property used in the business."

It appears that taxpayer reported its unitary income and apportioned it in accordance with those rules. The department audited taxpayer's returns. The auditor was aware that the Supreme Court had recently addressed the relationship between ORS 314.280 and the UDITPA statutes. ORS 314.610 through ORS 314.670. *See Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 898 P2d 1333 (1995). In that case, the court found that the legislature intended to retain the differences between the two approaches and therefore held that OAR 150-314.280-(I) (1983), which incorporated by reference the provision of OAR 150-314.670-(A) (1983), exceeded the department's authority. *Id.* at 354-55. Based on that case, the auditor here concluded that if adjusting the property factor by including intangible personal property resulted in a more fair and accurate apportionment of taxpayer's income, he was required to do so. Thus, the auditor adjusted taxpayer's returns, assessed additional tax, and this appeal followed.

ISSUE

Does the department have the authority to require the inclusion of intangible personal property in the property factor if such inclusion results in a more fair and accurate apportionment of net income?

ANALYSIS

This court must begin as always by examining the statute. To do so, the court first looks to the text and context to determine legislative intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). The pertinent portion of ORS 314.280(1) states:

> "[T]he department shall have power to permit or require [either of two methods] * * * under rules and regulations adopted by the department * * * "

1, 2. From that language it seems clear that the legislature intended to delegate legislative power to the department. *See Equitable Savings & Loan v. Dept. of Rev.*, 5 OTR 661, 674 (1974). That power is to be exercised by the promulgation of rules and regulations. In *Fisher*, the Supreme Court quoted some of the early rules adopted by the Oregon State Tax Commission, the department's predecessor. *See* 321 Or at 351-52. Those rules indicated it was a "must" that a unitary business use the apportionment method of reporting. Or Tax Reg 314.280(1)-(B) (1965); *see also Fisher*, 321 Or at 352. If not a unitary business and not required to file under that regulation, then the business taxpayer "must" use the segregated method. Or Tax Reg 314.280(1)-(A) (1965). *See also Fisher*, 321 Or at 352.

As suggested, ORS 314.280 has a relatively long history for a tax law. The corporate excise tax was created by the 1929 Legislature. *See generally* Or Laws 1929, ch 427. In *Hines Lumber Co. v. Galloway*, 175 Or 524, 154 P2d 539 (1944), the court construed section 110-1507, the initial form of ORS 314.280, noting that the tax commission was given authority to make recommendations or rules for the apportionment of income. In *Equitable Savings & Loan v. Tax Com.*, 251 Or 70, 78, 444 P2d 916 (1968), the Supreme Court indicated that the commission was given the authority to promulgate regulations to accomplish the apportionment of the unitary income of a corporation and had done so since at least 1938.

After these many years, the department appears to disavow the effect of its own rules on two grounds. First, the department contends that such rules are not intended to be applied without exception. The department asserts that because OAR 150-314.280-(E) is entitled "Apportionment Factors Generally" and because the rule indicates that "ordinarily" the three factors shall be used, it is not intended to be a fixed rule. The department apparently believes that it can vary from its own rules for any taxpayer not considered "ordinary" or "general." No language in the rules provides for such exceptions. That position is taken by the department based on its interpretation of its own rules.

The court notes that in OAR 150-314.280-(E), subparagraphs (1), (7), (8), and (9) each indicate that the rule in that subparagraph is "ordinarily" applied. Under general rules of construction, the absence of "ordinary" in the other subparagraphs would evidence an intent of no exceptions. The word "ordinarily" is not used in subparagraphs (2) and (3), the subparagraphs that apply to

taxpayer in this case. Therefore, even assuming some exceptions are intended under the rule, it appears that no exceptions are intended for the subparagraphs applicable in this case.

There is a more significant problem with the department's position. If the department can vary from its own rules at will on an ad-hoc basis, it emasculates the condition imposed by the legislature. The power granted to the department is to be exercised "under rules and regulations." ORS 314.280(1). The department would have the statute read "as the department determines necessary" rather than "under rules and regulations." That interpretation is unacceptable and contrary to the intent of the legislature.

The department's second ground for attacking or disavowing its own rules appears to be based on a misinterpretation of *Fisher*. *Fisher* held that the department exceeded its authority by adopting a rule making the three-factor apportionment method presumptively the method that must be used. 321 Or at 359. In view of that holding, the department now asserts that its rules are not binding, and if they are binding, they are invalid. The department states:

> "The defendant has never had authority to make the composition of a factor or apportionment formula mandatory for a utility or financial company, irrespective of whether it results in an accurate apportionment of net income."

3. The department reasons that in order to maintain "flexibility," the legislature intended that the department have authority to modify factors on a case-by-case basis. That is clearly contrary to the wording and intent of ORS

314.280. The "flexibility" referred to by the Supreme Court in *Fisher* was the possibility of using either the segregated method or the apportionment method. *See* 321 Or at 341. There was no suggestion in that case that the department has authority to modify either a method or its factors on an ad-hoc basis.

4. The authority granted to the department by ORS 314.280 is clearly conditioned. It is to be exercised by the promulgation of rules and regulations. In accordance with the statute, the department promulgated OAR 150-314.280-(E), which provides that the property factor is composed of real and tangible personal property. Taxpayer apparently filed its return in compliance with that rule. If the department can later, on an ad-hoc basis, change the rule, the statutory condition becomes meaningless and the rule itself is meaningless.

5. The department has adopted a new rule, OAR 150-314.280-(M), effective as of December 31, 1995. That rule was adopted in response to *Fisher* and indicates that the department may require an alternative method of apportionment in any case in which it determines that the usual method is not accurate. However, that rule was not expressly made retroactive and therefore will not be applied by the court to the years in question. *See AT&T v. Dept. of Rev.*, 15 OTR 202 (2000). Now, therefore,

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment is granted. Costs to neither party.

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OREGON

U.S. BANCORP and SUBSIDIARIES, Respondents, v. DEPARTMENT OF REVENUE, State of Oregon, Appellant.	Oregon Tax Court No. 4531 SC S51013 **ORDER ALLOWING PETITION FOR RECONSIDERATION AND CORRECTING OPINION**

Upon consideration by the court.

The petition for reconsideration is allowed in the following respects:

In response to taxpayer's petition for reconsideration, the following corrections will be made to the opinion in *U.S. Bancorp v. Dept. of Rev.*, 337 Or 625, 103 P3d 85 (2004).

The sentence at 337 Or at 636 n 6 will be corrected to state: "For purposes of its summary judgment motion, taxpayer does not dispute the department's averment that inclusion of taxpayer's intangible personal property results in a more accurate apportionment of its net income to Oregon."

The sentence at 337 Or at 636 n 7 will be corrected to state: "As a result of that position in the Tax Court, we decline to exercise our discretion to address taxpayer's challenge to the department's authority to promulgate OAR 150-314.280-(M) (1995). *See Outdoor Media Dimensions*

Inc. v. State of Oregon, 331 Or 634, 658-660, 20 P3d 180 (2001) (discussing 'right for the wrong reason' doctrine)."

Those corrections will be made in the bound volume of the Oregon Reports. Taxpayer's petition for reconsideration otherwise is denied.

Dated this 1st day of February 2005.

/s/ Wallace P. Carson, Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: William S. Manne
Laura L. Takasumi
Bruce L. Campbell
Ryan R. Nisle
Jas. Jeffrey Adams

APPENDIX E

ORS 314.280 (1987) Allocation of income of financial organization or public utility from business within and without state. (1) If a taxpayer has income from business activity as a financial organization or as a public utility (as defined respectively in ORS 314.610(4) and (6)) which is taxable both within and without this state (as defined in ORS 314.610(8) and 314.615), the determination of net income shall be based upon the business activity within the state, and the department shall have power to permit or require either the segregated method of reporting or the apportionment method of reporting, under rules and regulations adopted by the department, so as fairly and accurately to reflect the net income of the business done within the state.

(2) The provisions of subsection (1) of this section dealing with the apportionment of income earned from sources both within and without the State of Oregon are designed to allocate to the State of Oregon on a fair and equitable basis a proportion of such income earned from sources both within and without the state. Any taxpayer may submit an alternative basis of apportionment with respect to the income of the taxpayer and explain that basis in full in the return of the taxpayer. If approved by the department that method will be accepted as the basis of allocation.

OAR 150-314.280(A)-(M) (1987)

Apportionment and Allocation of Income of Financial Organizations and Public Utilities from Business Activities Within and Without Oregon

150-314.280-(A) The several parts of OAR 150-314.280, as amended in 1965 and thereafter, shall apply

for all tax years beginning on and after January 1, 1965. Apportionment of income for tax years beginning prior to January 1, 1965, shall be governed by the law and rules in effect with respect to such years.

Definitions

150-314.280-(B) The definitions of "business income," "commercial domicile," "compensation," "financial organization," "non-business income," "public utility," "sales," and "state," contained in ORS 314.610 and the related rules are by this reference incorporated herein and made a part of this OAR 150-314.280-(B).

"Taxpayer" means a financial organization or a public utility.

Apportionment and Allocation of Income Generally

150-314.280-(C) The provisions of OAR 150-314.615-(A) to 150-314.615-(F), 150-314.620-(A) to 150-314.620-(C), 150-314.640 and 150-314.670-(A) are by this reference incorporated herein and made a part of this OAR 150-314.280-(C).

Allocation of Income

150-314.280-(D) The provisions of ORS 314.625 to 314.645, inclusive, are by this reference incorporated herein and made a part of this OAR 150-314.280-(D).

Apportionment Factors Generally

150-314.280-(E) After deducting the nonapportionable income, the remainder shall ordinarily be apportioned to this state by giving equal weight to three factors.

For a financial organization, the three factors shall be payroll, property and gross revenue.

"Property" means real and tangible personal property used in the business.

"Gross revenue" means all income, including interest, fees, service charges, discounts, gains from sale of assets and miscellaneous income.

Interest income in the apportionment formula shall be assigned as Oregon income when the real property on which a loan is made is located in this state. Interest on loans on personal property shall be assigned as income to the office making the loan. Other interest and income from service charges, fees, gains from sale of assets and other miscellaneous earnings all shall be assigned to the office charging for the service or earning the income.

A "domestic insurer," as defined in ORS 317.010(11), that is subject to tax both within and outside Oregon, shall apportion its net income by giving equal weight to the three factors set out in ORS 317.660 (insurance premiums, wages and commissions, and real estate income and interest). Title insurance companies and health care service contractors are not classed as "domestic insurers" under ORS 317.010(11) and so shall not apportion their income under ORS 317.660. These companies shall apportion their income by giving equal weight to the three factors of property, payroll and gross premium receipts.

For public utilities, other than carriers of freight or passengers, companies engaged in sea transportation services, and companies engaged in interstate river transportation, the three factors ordinarily shall be property, payroll and sales.

For companies engaged in sea transportation services and companies engaged in interstate river transportation, the three factors ordinarily shall be modified property, payroll and sales factors.

For carriers of freight or passengers, the three factors ordinarily shall be modified property and payroll factors and a revenue factor. Modified factors for such carriers, sea transportation companies, and interstate river transportation companies are contained in OAR 150-314.280-(G), 150-314.280-(H) and 150-314.280-(J).

Apportionment Factors

150-314.280-(F) *Property factor.* The provisions of ORS 314.655 and the rules pertaining thereto, are by this reference incorporated herein and made a part of this OAR 150-314.280-(F).

Payroll factor. The provisions of ORS 314.660 and the rules pertaining thereto, are by this reference incorporated herein and made a part of this OAR 150-314.280-(F).

Sales factor. The provisions of ORS 314.665 and the rules pertaining thereto, are by this reference incorporated herein and made a part of this OAR 150-314.280-(F).

Other factors. The provisions of OAR 150-314.670-(B) and (C) are by this reference incorporated herein and made a part of this OAR 150-314.280-(F).

Modified Factors for Carriers of Freight or Passengers: General Rule

150-314.280-(G) (1) A substantial portion of the net income of taxpayers engaged in the transportation of

freight or passengers within and without Oregon results from the movement of revenue-producing equipment, drivers and other personnel. It is therefore necessary in calculating the apportionment factor of such carriers to reflect the results of the movement of such equipment and personnel by using revenue miles traveled both within and without the state. Thus, the apportionment formula of such transportation companies is to be computed as follows:

(a) *Tangible Property.* Fixed properties, such as buildings and land used in the business, shop equipment, cars and trucks used in gathering or delivering local freight, will be assigned to the state in which such properties are located. The value of trucks or other equipment used in over-the-road hauling or other transportation will be assigned to this state on a revenue miles basis. For example, if ten percent of a taxpayer's revenue miles are in Oregon, then ten percent of the value of the revenue-producing equipment will be included as part of the Oregon property factor.

(b) *Payroll.* The wages and salaries of employees assigned to fixed locations within this state shall be included in the Oregon payroll factor. The wages of personnel of over-the-road or other transportation equipment will be assigned to this state upon the basis of revenue miles. The wages of such personnel shall be apportioned to Oregon in the proportion that revenue miles traveled within this state bear to total revenue miles traveled everywhere.

(c) *Revenues.* Revenues will be assigned to this state in the proportion that the revenue miles traveled within

the state bear to the total revenue miles traveled everywhere.

Modified Factors for Carriers of Freight or Passengers: Special Rules – Railroads

150-314.280-(H) (1) *In General.* Where a railroad has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this rule. In such cases, the first step is to determine what portion of the railroad's income constitutes "business" income and which portion constitutes "nonbusiness" income under ORS 314.610 and OAR 150-314.610(1)-(A) and (B). Nonbusiness income is directly allocable to specific states under ORS 314.625 to 314.645. Business income is apportioned among the states in which the business is conducted pursuant to the property, payroll and sales apportionment factors set forth in this rule. The sum of (1) the items of nonbusiness income directly allocated to this state, plus (2) the amount of business income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax by this state.

(2) *Business and Nonbusiness Income.* For definitions, rules and examples for determining business and nonbusiness income, see OAR 150-314.610(1)-(A) and (B).

(3) *Apportionment of Business Income.*

(a) *In General.* The property factor shall be determined in accordance with ORS 314.655, the payroll factor in accordance with ORS 314.660, and the sales factor in accordance with ORS 314.665, except as modified in this rule.

(b) *The Property Factor.*

(A) *Property Valuation.* Owned property shall be valued at its original cost and property rented from others shall be valued at eight (8) times the net annual rental rate in accordance with ORS 314.655 and OAR 150-314.655(2)-(B). Railroad cars owned and operated by other railroads and temporarily used by the taxpayer in its business and for which a per diem or mileage charge is made are not included in the property factor as rented property. Railroad cars owned and operated by the taxpayer and temporarily used by other railroads in their business and for which a per diem charge is made by the taxpayer are included in the property factor of the taxpayer.

(B) *General Definitions.* The following definitions are applicable to the numerator and denominator of the property factor:

(i) "Original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal income tax adjustments except for subsequent capital additions, improvements thereto or partial dispositions); or, if the property has no such basis, the valuation of such property for Interstate Commerce Commission purposes. If the original cost of property is unascertainable under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer. (OAR 150-314.655(2)-(A))

(ii) "Rent" does not include the per diem and mileage charges paid by the taxpayer for the temporary use of railroad cars owned or operated by another railroad.

(iii) The "value" of owned real and tangible personal property shall mean its original cost. (ORS 314.655 and OAR 150-314.655(2)-(A))

(iv) "Average value" of property means the amount determined by averaging the values at the beginning and ending of the tax period, but the Department may require the averaging of monthly values during the tax period or such averaging as necessary to reflect properly the average value of the railroad's property. (ORS 314.655 and OAR 150-314.655(3))

(v) The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate. (ORS 314.655 and OAR 150-314.655(2)-(B))

(vi) "Net annual rental rate" means the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(vii) "Property used during the tax period" includes property which is available for use in the taxpayer's trade or business during the tax period.

(viii) A "locomotive-mile" is the movement of a locomotive (a self-propelled unit of equipment designed solely for moving other equipment) a distance of one mile under its own power.

(ix) A "car-mile" is a movement of a unit of car equipment a distance of one mile.

(C) *The Denominator and Numerator of the Property Factor.* The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the

tax period. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period.

In determining the numerator of the property factor, all property except mobile or movable property such as passenger cars, freight cars, locomotives and freight containers which are located within and without this state during the tax period shall be included in the numerator of the property factor in accordance with ORS 314.655 and OAR 150-314.655(1)-(D).

Mobile or movable property such as passenger cars, freight cars, locomotives and freight containers which are located within and without this state during the tax period shall be included in the numerator of the property factor in the ratio which "locomotive-miles" and "car-miles" in the state bear to the total everywhere.

(c) *The Payroll Factor.* The denominator of the payroll factor is the total compensation paid everywhere by the taxpayer during the tax period for the production of business income. (ORS 314.660 and OAR 150-314.660(1)) The numerator of the payroll factor is the total amount paid in this state during the tax period by the taxpayer for compensation. With respect to all personnel except the engine crew and train crew performing services on interstate trains, compensation paid to such employees shall be included in the numerator as provided in ORS 314.660 and OAR 150-314.660(2).

With respect to the engine crew and train crew performing services on interstate trains, compensation paid to such employees shall be included in the numerator of the payroll factor in the ratio which their services performed

in this state bear to their services performed everywhere. Compensation for services performed in this state shall be deemed to be the compensation reported or required to be reported by such employees for determination of their income tax liability to this state.

(d) *The Sales (Revenue) Factor.*

(A) *In General.* All revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer which produces business income, except pr diem and mileage charges which are collected by the taxpayer, is included in the denominator of the revenue factor. (ORS 314.665 and OAR 150-314.665(1)-(A))

The numerator of the revenue factor is the total revenue of the taxpayer in this state during the tax period. The total revenue of the taxpayer in this state during the tax period, other than revenue from hauling freight, passengers, mail and express, shall be attributable to this state in accordance with ORS 314.665 and OAR 150-314.665(2)-(A).

(B) *Numerator of Sales (Revenue) Factor From Freight, Mail and Express.* The total revenue of the taxpayer in this state during the tax period for the numerator of the revenue factor from hauling freight, mail and express shall be attributable to this state as follows:

(i) All receipts from shipments which both originate and terminate within this state; and

(ii) That portion of the receipts from each movement or shipment passing through, into, or out of this state is determined by the ratio which the miles traveled by such movement or shipment in this state bears to the total

miles traveled by such movement or shipment from point of origin to destination.

(C) *Numerator of Sales (Revenue) Factor From Passengers.* The numerator of the sales (revenue) factor shall include:

(i) All receipts from the transportation of passengers (including mail and express handled in passenger services) which both originate and terminate within this state; and

(ii) That portion of the receipts from the transportation of interstate passengers (including mail and express handled in passenger service) determined by the ratio which revenue passenger miles in this state bear to the total everywhere.

Modified Factors for Carriers of Freight or Passengers: Special Rules – Airlines

150-314.280-(I) (1) *In General.* Where an airline has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to ORS 314.610 to 314.665 except as modified by this rule.

(2) *Apportionment of Business Income.*

(a) *General Definitions.* The following definitions are applicable to the terms used in the apportionment factor descriptions.

(A) "Value" of owned real and tangible personal property shall mean its original cost. (ORS 314.655 and OAR 150-314.655(2)-(A))

(B) "Cost of aircraft by type" means the average original cost or value of aircraft by type which are ready for flight.

(C) "Original cost" means the initial federal tax basis of the property plus the value of capital improvements to such property, except that, for this purpose, it shall be assumed that Safe Harbor Leases are not true leases and do not affect the original initial federal tax basis of the property.

(D) "Average value" of property means the amount determined by averaging the values at the beginning and ending of the income year, but the department may require the averaging of monthly values during the income year if such averaging is necessary to reflect properly the average value of the airline's property. (ORS 314.655 and OAR 150-314.655(3))

(E) The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate. (ORS 314.655 and OAR 150-314.655(2)-(B))

(F) "Net annual rental rate" means the annual rental rate paid by the taxpayer.

(G) "Property used during the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

(H) "Aircraft ready for flight" means aircraft owned or acquired through rental or lease (but not interchange) which are in the possession of the taxpayer and are available for service on the taxpayer routes.

(I) "Revenue service" means the use of aircraft ready for flight for the production of revenue.

(J) "Transportation revenue" means revenue earned by transporting passengers, freight and mail as well as revenue earned from liquor sales, pet crate rentals, etc.

(K) "Departures" means for purposes of these regulations all takeoffs, whether they be regularly scheduled or charter flights, that occur during revenue service.

(b) *Property Factor*

(A) *Property valuation.* Owned aircraft shall be valued at its original cost and rented aircraft shall be valued at eight (8) times the net annual rental rate in accordance with ORS 314.655 and OAR 150-314.655(2)-(B). The use of the taxpayer's owned or rented aircraft in an interchange program with another air carrier will not constitute a rental of such aircraft by the airline to the other participating airline. Such aircraft shall be accounted for in the property factor of the owner. Parts and other expendables, including parts for use in contract overhaul work, will be valued at cost.

(B) *The denominator and numerator of the property factor.* The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the tangible personal property owned or rented and used in this state during the income year.

In determining the numerator of the property factor, all property except aircraft ready for flight shall be included in the numerator of the property factor in accordance with ORS 314.655 and OAR 150-314.655(1)-(D).

Aircraft ready for flight shall be included in the numerator of the property factor in the ratio calculated as follows:

Departures of aircraft from locations in this state weighted as to the cost and value of aircraft by type compared to total departures similarly weighted.

(c) *Payroll Factor.*

The denominator of the payroll factor is the total compensation paid everywhere by the taxpayer during the income year. (ORS 314.660 and OAR 150-314.660(1)) The numerator of the payroll factor is the total amount paid in this state during the income year by the taxpayer for compensation. With respect to non-flight personnel, compensation paid to such employees shall be included in the numerator as provided in ORS 314.660 and OAR 150-314.660(2). With respect to flight personnel (the air crew aboard an aircraft assisting in the operations of the aircraft or the welfare of passengers while in the air), compensation paid to such employees shall be included in the ratio that departures of aircraft from locations in this state, weighted as to the cost and value of aircraft by type, compared to total departures similarly weighted, multiplied by the total flight personnel compensation.

(d) *Sales (Transportation Revenue) Factor.*

The transportation revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer and miscellaneous sales of merchandise, etc., are included in the denominator of the revenue factor. (ORS 314.665 and OAR 150-314.665(1)-(A)) Passive income items such as interest, rental income, dividends, etc., will not be included in the denominator nor will the proceeds or net gains or losses from the sale of aircraft be

included. The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year is the result of the following calculation:

The ratio of departures of aircraft in this state weighted as to the cost and value of aircraft by type, as compared to total departure similarly weighted, multiplied by the total transportation revenue. The product of this calculation is to be added to any nonflight revenues directly attributable to this state.

(3) *Records.* The taxpayer must maintain the records necessary to arrive at departures by type of aircraft as used in these rules. Such records are to be subject to review by the state of Oregon or their agents.

Example 1: Assume the following facts for an airline for the tax year:

1. It has ten 747's ready for flight and in revenue service at an average per unit cost of $40,000,000 for nine (9) of the aircraft. It rents the remaining 747 from another airline for $9,000,000 per year. At eight times rents, the latter is valued at $72,000,000 for apportionment purposes. Total 747 valuation is, therefore, $432,000,000 for property factor denominator purposes.

2. It has twenty 727's ready for flight and in revenue service at an average per unit cost of $20,000,000. Total 727 valuation is, therefore, $400,000,000 for property factor denominator purposes.

3. It has nonflight tangible property (n.t.p.) valued at original cost of $200,000,000.
4. It has the following annual payroll:

flight personnel	$ 60,000,000
nonflight personnel	40,000,000
Total	$ 100,000,000

5. From its operations, it has total receipts of $50,000,000, business net income of $1,000,000 and no nonbusiness income.
6. It has the following within State X:
   a. 10% of its 747 flight departures ($43,200,000);
   b. 20% of its 727 flight departures ($80,000,000);
   c. 5% of its nonflight tangible property (n.t.p.) ($10,000,000); and
   d. 15% of its nonflight personnel payroll (6,000,000).
7. State X has a corporate tax rate of 10%.

The airline's tax liability to State X would be determined as follows:

Property Factor:

$$\frac{43{,}200{,}000\ (747\text{'s}) + 80{,}000{,}000\ (727\text{'s}) + 10{,}000{,}000\ (\text{n.t.p.})}{432{,}000{,}000\ (747\text{'s}) + 400{,}000{,}000\ (727\text{'s}) + 200{,}000{,}000} = \frac{133{,}200{,}000}{1{,}032{,}000{,}000} = 12.91\%$$

Sales Factor:

$$\frac{43{,}200{,}000\ (747\text{'s}) + 80{,}000{,}000\ (727\text{'s})}{432{,}000{,}000\ (747\text{'s}) + 400{,}000{,}000\ (727\text{'s})} = \frac{123{,}200{,}000\ (\text{n.t.p.})}{832{,}000{,}000} = 14.81\%$$

Payroll Factor:

$$\frac{6{,}000{,}000\ (\text{nonflight}) + 8{,}886{,}000\ (.1481 \times 60{,}000{,}000)\ (\text{flight})}{1{,}000{,}000{,}000} = \frac{14{,}886{,}000}{100{,}000{,}000} = 14.89\%$$

Average ratio – (Property, sales and payroll factors) =

$$\frac{12.91 + 14.81 + 14.89}{3} = \frac{42.61}{3} = 14.20\%$$

Taxable Income in State X: .142 x $1,000,000 = $142,000
Tax Liability to State X: .10 x $142,000 = $14,200

Example 2: Same facts except that paragraphs 6 and 7 are changed to read:

6. It has the following within State Y:
   a. 6% of its 747 flight departures ($25,920,000)
   b. 31% of its 727 flight departures ($124,000,000)
   c. 3% of its nonflight tangible property ($6,000,000)
   d. 7% of its nonflight personnel payroll ($2,800,000)
7. State Y has a corporate tax rate of 6½%.

The airline's tax liability to State Y would be determined as follows:

Property Factor:

$$\frac{25{,}920{,}000\ (747\text{'s}) + 124{,}000{,}000\ (727\text{'s}) + 6{,}000{,}000\ (\text{n.t.p.})}{432{,}000{,}000 + 400{,}000{,}000 + 200{,}000{,}000} = \frac{155{,}920{,}000}{1{,}032{,}000{,}000} = 15.108\%$$

Sales Factor:

$$\frac{25{,}920{,}000\ (747\text{'s}) + 124{,}000{,}000\ (727\text{'s})}{432{,}000{,}000 + 400{,}000{,}000} = \frac{149{,}920{,}000}{832{,}000{,}000} = 18.019\%$$

Payroll Factor:

$$\frac{2{,}800{,}000\ (\text{nonflight} + 10{,}811{,}400\ (.18019 \times 60{,}000{,}000)\ (\text{flight})}{1{,}000{,}000{,}000} = \frac{13{,}611{,}400}{100{,}000{,}000} = 13.611\%$$

Average ratio: –

$$\frac{15.108 + 18.019 + 13.611}{3} = \frac{46.738}{3} = 15.579\%$$

Taxable Income in State Y: .15579 x $1,000,000 = $155,790
Tax Liability to State Y: .065 x $155,790 = $10,126

Modified Factors for Carriers of Freight or Passengers: Special Rules – Trucking Companies

150-314.280-(J) (1) In General. As used in this rule, the term "trucking company" means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. Where a trucking company has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this rule. In such cases, the first step is to determine what portion of the trucking company's income constitutes "business" income and what portion constitutes "nonbusiness" income under ORS 314.610 and the corresponding rules. Nonbusiness income is directly allocable to specific states pursuant to the provisions of ORS 314.625 through ORS 314.645. Business income is apportioned among the states in which the business is conducted pursuant to the property, payroll, and sales factors set forth in this rule. The sum of (a) the items of nonbusiness income directly allocated to this state plus (b) the amount of business income attributable to this state constitutes the amount of the taxpayer's entire net income which is subject to tax in this state.

(2) Business and Nonbusiness Income. For definitions, rules, and examples for determining business and nonbusiness income, see OAR 150-314.610(1)-(A) through 150-314.610(1)-(C).

(3) Apportionment of Business Income.

(a) In General. The property factor shall be determined in accordance with ORS 314.655, the payroll factor in accordance with ORS 314.660, and the sales factor in

accordance with ORS 314.665, except as modified in this rule.

(b) The Property Factor.

(A) Property Valuation. Owned property shall be valued at its original cost and property rented from others, including purchased transportation, shall be valued at eight times the net annual rental rate in accordance with ORS 314.655(2) and OAR 314.655(2)-(B). To the extent that the taxpayer's records reflect a separate charge incurred for the use of purchased transportation attributable to the property so used, such separate charge shall be used in calculating the value of rented property. If such a charge is not separated from that attributable to the compensation paid for the operator of the purchased transportation, the total combined charge shall be reduced by 20 percent to determine that portion of the charge attributable solely to the value of the rented property. Mobile property, other than purchased transportation, which is owned by other trucking companies and temporarily used by the taxpayer in its business and for which a per diem or mileage charge is made shall not be included in the property factor as rented property. Mobile property which is owned by the taxpayer and temporarily used by other trucking companies in their business and for which a per diem or mileage charge is made by the taxpayer shall be included in the property factor of the taxpayer.

(B) General Definitions. The following definitions are applicable to the numerator and denominator of the property factor, as well as other apportionment factor descriptions:

(i) "Average value" of property means the amount determined by averaging the values at the beginning and

end of the tax period, but the department may require the averaging of monthly values during the tax period or such averaging as is necessary to reflect properly the average value of the trucking company's property. (See OAR 150-314.655(3).)

(ii) "Mobile property" means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property, other than support vehicles used predominantly in a local capacity. Mobile property shall include purchased transportation.

(iii) A "mobile property mile" is the movement of a unit of mobile property a distance of one mile whether loaded or unloaded.

(iv) "Original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal income tax adjustments, except for subsequent capital additions, improvements thereto, or partial dispositions); or, if the property has no such basis, the valuation of such property for Interstate Commerce Commission purposes. If the original cost of property cannot be ascertained under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer. (OAR 150-314.655(2)-(A).)

(v) "Property used during the tax period" includes property which is available for use in the taxpayer's trade or business during the tax period.

(vi) "Purchased transportation" means the taxpayer's use of a motor vehicle owned and operated by another for the purpose of transporting tangible personal

property for which a charge, whether based upon a per diem, mileage, or other basis is incurred.

(vii) "Temporarily used" means the use of any mobile property owned by another for a period not to exceed a total of 30 days during any tax period.

(viii) The "value" of owned real and tangible personal property means its original cost. (See ORS 314.655(2) and OAR 150-314.655(2)-(A).)

(ix) The "value" of rented real and tangible personal property means the product of eight times the net annual rental rate. (See ORS 314.655(2) and OAR 314.655(2)-(B).)

(C) The Denominator and Numerator of the Property Factor. The denominator of the property factor shall be the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period. In the determination of the numerator of the property factor, all property, except mobile property as defined in this rule, shall be included in the numerator of the property factor in accordance with ORS 314.655 and the corresponding rules. Mobile property as defined in this rule, which is located within and without this state during the tax period shall be included in the numerator of the property factor in the ratio which mobile property miles in the state bear to the total mobile property miles.

(c) The Payroll Factor. The denominator of the payroll factor is the compensation paid everywhere by the taxpayer during the tax period for the production of

business income. (See ORS 314.660 and the corresponding rules.) The numerator of the payroll factor is the total compensation paid in this state during the tax period by the taxpayer. With respect to all personnel, except those performing services within and without this state, compensation paid to such employees shall be included in the numerator as provided in ORS 314.660 and the corresponding rules. With respect to personnel performing services within and without this state, compensation paid to such employees shall be included in the numerator of the payroll factor in the ratio which their services performed in this state bear to their services performed everywhere based on mobile property miles.

(d) The Sales Factor.

(A) In General. All revenue derived from transactions and activities in the regular course of the taxpayer's trade or business which produce business income shall be included in the denominator of the revenue factor. (See ORS 314.665(1) and OAR 150-314.665(1)-(A).) The numerator of the revenue factor is the total revenue of the taxpayer in this state during the tax period. The total state revenue of the taxpayer, other than revenue from hauling freight, mail, and express, shall be attributable to this state in accordance with ORS 314.665 and the corresponding rules.

(B) Numerator of the Sales (Revenue) Factor from Freight, Mail, and Express. The total revenue of the taxpayer attributable to this state during the tax period from hauling freight, mail, and express shall be:

(i) Intrastate: All receipts from any shipment which both originates and terminates within this state; and,

(ii) Interstate: That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

(4) Records. The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as those terms are used in this rule. Such records are subject to review by the department or its agents.

(5) De Minimis Nexus Standards. Notwithstanding any provision contained herein, this rule shall not apply to require the apportionment of income to this state if the trucking company during the course of the tax period neither:

(a) Owns nor rents any real or personal property in this state, except mobile property; nor

(b) Makes any pick-ups or deliveries within this state; nor

(c) Travels more than twenty-five thousand mobile property miles within this state; provided that the total mobile property miles traveled within this state during the tax period does not exceed 3 percent of the total mobile property miles traveled in all states by the trucking company during that tax period; nor

(d) Makes more than twelve trips into this state.

Modified Factors for Companies Engaged in Sea Transportation Service

150-314.280-(K) Sea transportation services within this rule include the activities of steamship companies substantially engaged in interstate or international commerce which derive income within and partly from sources without the state. They do not include the activities of water transportation carriers operating mainly on the Columbia and Willamette Rivers or water transportation carriers operating primarily within Oregon waters.

The Oregon income of a taxpayer carrying on the business of sea transportation services shall be calculated by applying the average of the following three apportionment factors to the net apportionable income of the taxpayer.

(1) Sales factor. The sales or gross receipts factor is a fraction, the denominator of which shall include all receipts derived from carrying cargo, i.e., passengers, freight, mail, etc., and the receipts incidental thereto. In calculating the numerator of the factor, such sales or gross receipts shall be assigned to this state in the proportion that the voyage time the ship spent within this state during the tax period bears to the total voyage time of the ship during the tax period.

Receipts from activities incidental to the transportation service, such as income from restaurants, locker rentals, etc., shall be assigned to the state or country in which the activity is carried on.

(2) Payroll factor. The denominator of the payroll factor is the total compensation paid everywhere by the taxpayer during the tax period for the production of business income. (ORS 314.660 and OAR 150-314.660(1))

The numerator of the payroll factor is the total amount paid in this state during the tax period by the taxpayer for compensation. With respect to all personnel except ocean going personnel, compensation paid to such employees shall be included in the numerator as provided in ORS 314.660 and OAR 150-314.660(2). The numerator shall contain so much of the compensation of oceangoing personnel as is determined by applying a fraction, the numerator being the voyage time the ship spent within this state during the tax period and the denominator being the total voyage time of the ship during the tax period.

(3) Property factor. The property factor is a fraction, the denominator of which shall include the value of all real and tangible personal property, including ships, owned, rented or leased by the taxpayer and used in the business. The numerator of this factor shall include all real and personal property owned, rented or leased by the taxpayer and used in the business, except ships, to the extent such assets are located in the state, and so much of the value of ships used in the business as is determined by applying the ratio that the voyage time which the ship was within this state during the tax period bears to the total voyage time of the ship during the tax period.

The value of ships used in the business but not owned by the user, such as chartered vessels, shall be the same as their value for insurance purposes. Other rented or leased property shall be valued in the manner set out in ORS 314.655 and OAR 150-314.655(2)-(B).

The term "voyage time" means the time that a ship is in operation for the purpose of transporting cargo, freight, mail, passengers, etc. The time that a ship is in operation includes all sailing time, even though a ship is returning empty or is en route to a port of call to load passengers or

cargo, all time in port while loading and unloading, all time awaiting cargo, and all time that the ship is laid up for ordinary repairs, refueling, or provisioning. A ship is not in operation when out of service or during the time that it is laid up for extensive repairs, overhaul, modification or is in dry dock.

The voyage time spent traveling on the Columbia River below mile post 309 shall be divided equally between Oregon and Washington. For purposes of this rule a vessel shall not be considered traveling on the Columbia River while remaining at a port even though the vessel moves from one terminal or dock to another within that port.

Example: Taxpayer A uses minutes to measure voyage time. The following table shows the vessel's actions and the time attributable to Oregon between actions.

Date	Time	Action	Oregon Time (Minutes)
Aug. 16	12:00 noon	Enters mouth of Columbia River	
Aug. 17	4:30 p.m.	Docks at Vancouver, Washington	855
Aug. 20	1:00 p.m.	Leaves Vancouver dock	-0-
Aug. 20	4:00 p.m.	Leaves Columbia River and enters mouth of Willamette River	90
Aug. 20	6:00 p.m.	Docks at Portland, Oregon	120
Aug. 23	6:00 a.m.	Leaves Portland dock	3600
Aug. 23	8:00 a.m.	Leaves mouth of Willamette and enters Columbia River	120
Aug. 24	11:00 a.m.	Leaves mouth of Columbia River	810
Total time attributed to Oregon			5595

Modified Factors for Companies Involved in Interstate River Transportation Service

150-314.280-(L) A taxpayer involved in interstate river transportation shall calculate its Oregon income by applying the average of the following three apportionment factors to the net apportionable income of the taxpayer.

(1) Sales factor. The sales or gross receipts factor is a fraction. The denominator shall include all sales or gross receipts. The numerator of this factor shall include all sales or gross receipts not derived from interstate river transportation, assigned to this state in accordance with ORS 314.665. The numerator also includes all sales or gross receipts derived from vessels engaged in river transportation between Oregon and other states as is determined by applying the Oregon Interstate Mobil Allocation Formula (IMAF).

(2) Payroll factor. The payroll factor is a fraction. The denominator is the amount of all compensation paid to officers and employees, including personnel engaged in river transportation. The numerator of this factor shall include all compensation paid to officers and employees not engaged in interstate river transportation, assigned to this state in accordance with ORS 314.660. The numerator also includes so much of the compensation to personnel engaged in river transportation between Oregon and other states as is determined by applying the Oregon IMAF.

(3) Property factor. The property factor is a fraction. The denominator shall include the value of all real and tangible personal property, including vessels, owned, rented or leased by the taxpayer and used in the business. The numerator of this factor shall include all real and personal property owned, rented or leased by the taxpayer

and used in the business to the extent such assets are located in the state. The numerator also includes so much of the value of vessels engaged in river transportation between Oregon and other states and used in the business as is determined by applying the Oregon IMAF. The value of vessels used in the business but not owned by the user shall be the same as their value for insurance purposes. Property rented by the taxpayer is valued at eight times its net annual rental rate as set out in ORS 314.655 and OAR 150-314.655(2)-(B).

For purposes of this rule, the Oregon IMAF is the average of two factors. The two factors are the originating and terminating tons factor and the ton-miles factor. For purposes of computing both factors, only mileage and tonnage from those vessels which operate on some portion of a river which constitutes the border between Oregon and other states is included in the computation. For example: The ton-miles generated by vessels operating on the Mississippi River or exclusively on the Willamette River would not be included in the computation.

The originating and terminating tons factor is a fraction. The denominator is the total number of tons handled by the vessels engaged in river transportation between Oregon and other states. The numerator is the number of tons assigned to Oregon. The tons attributed to a voyage from one Oregon port to another Oregon port shall be credited wholly to Oregon. The tons attributed to a voyage between ports in different states shall be credited equally to the two states. For this purpose each trip between two ports of call is treated as a separate voyage even though the cargo may be scheduled for later movement to one or more ports.

The ton-miles factor is a fraction. The denominator is the total number of ton-miles generated by the vessels engaged in river transportation between Oregon and other states. The numerator of the fraction shall consist of those ton-miles assignable to Oregon. Ton-miles generated on the Willamette shall be credited wholly to Oregon. Ton-miles generated on that part of the Columbia above mile 309 shall be credited wholly to Washington. One-half of those ton-miles generated on the portion of a river that forms the boundary between Oregon and another state shall be credited to Oregon. Ton-miles are figured by multiplying tons carried for each movement by miles traveled.

Example:

Derivation of Interstate Mobile Allocation Factors, Typical Water Transportation Company

Line	Movements From (1)	To (2)	Tons Carried (3)	** Originating & Terminating Tons Assigned to States Idaho (4)	Oregon (5)	Wash. (6)	Miles Ore. (7)	Common (8)	Wash. (9)	Id.	Total Ton Miles (11)	**Ton Miles Assigned to States Idaho (12)	Oregon (13)	Wash. (14)
1	Biggs, OR	Portland, Or	300	0	300	0	8	106			34,200	0	18,300	15,900
2	Central Ferry, WA	Vancouver, WA	400	0	0	400		204	98.0		120,800	0	40,800	80,000
3	Portland, OR	Longview, WA	600	0	300	300	8	34			25,200	0	15,000	10,200
4	Lewiston, ID	Astoria, OR	1200	600	600	0		295	155.6	0.4	541,200	480	177,000	363,720
5	Portland, OR	Lake Oswego, OR	800	0	800	0	12				9,600	0	9,600	0
6	Lewiston, ID	Pasco, WA	400	200	0	200			142.6	0.4	57,200	160	0	57,040
7	Pasco, WA	Portland, OR	500	0	250	250	8	208	19.0		117,500	0	56,000	61,500
8	TOTALS		4200	800	2250	1150					905,700	640	316,700	588,360
9	PERCENTAGE		100.00	19.05	53.57	27.38					100.00	0.07	34.97	64.96

		Idaho	Oregon	Washington
10	Ton Mile Factor	0.07 x 50% = 0.03	34.97 x 50% = 17.48	64.96 x 50% = 32.48
11	Tons Factor	19.05 x 50% = 9.53	53.57 x 50% = 26.79	27.38 x 50% = 13.69
12	State Allocation Factors Totals	9.56%	44.27%	46.17%

Col. (3) is the reported tonnage of Commodities in past year between ports or terminals.
Col. (7) is Miles traveled on Oregon waters, i.e., Willamette River, etc.
Col. (8) is Miles traveled along interstate boundary portion of Columbia River.
Col. (9) is Miles traveled above mp 309 on Columbia River and other Washington waters, i.e., Snake River, etc.
Col. (10) is Miles traveled on Idaho waters, i.e., Snake River
Col. (11) is (Sum of cols. (7), (8), (9) and (10) x Col. (3)).

NOTES: * Amounts in Col. (4), (5) and (6) result from assignment of tons in Col. (3) as follows:
(a) tonnage both originated and terminated in state: 100% to that state
(b) Tonnage originated or terminated in a state: 50% to that state
(c) Tonnage originated and terminated outside a state: 0% to subject state

** Amounts in Col. (12), (13) and (14) result from multiplying Tons Carried in Col. (3) for each movement by the sum of intrastate miles plus half of any common boundary miles for each state.

Other Methods: Limited Application

150-314.280-(M) If the allocation and apportionment provisions of OAR 150-314.280-(A) to 150-314.280-(L) do not fairly represent the extent of the taxpayer's business activity in this state and result in the violation of the taxpayer's rights under the Constitution of this state or of the United States, the taxpayer may petition for and the department may permit, or the department may require, in respect to all or any part of the taxpayer's business activity:

(1) Separate accounting;

(2) The exclusion of any one or more of the factors;

(3) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

OAR 150-314.280(E) & (N) (1993)

Apportionment Factors Generally

150-314.280-(E) (1) For financial organizations, the three factors shall be modified as provided in OAR 150-314.280-(N).

(2) Title insurance companies and health care service contractors are not classed as "domestic insurers" under ORS 317.010(11) and so shall not apportion their income under ORS 317.660. These companies shall apportion their

income under the provisions of ORS 314.605 to 314.670, except that "sales" includes "gross premium receipts."

(3) For public utilities (other than carriers of freight or passengers), companies engaged in sea transportation services, and companies engaged in interstate river transportation, the three factors shall be property, payroll and sales.

(4) For companies engaged in sea transportation services and companies engaged in interstate river transportation, the three factors shall be modified property, payroll and sales factors.

(5) For carriers of freight or passengers, the three factors shall be modified property and payroll factors and a revenue factor. Modified factors for such carriers, sea transportation companies, and interstate river transportation companies are contained in OAR 150-314.280-(G) through OAR 150-314.280-(L).

Modified Factors for Financial Organizations

150-314.280-(N) (1) A financial organization having income from business activity which is taxable both within and without this state shall allocate and apportion its net income as provided in this rule for tax years beginning on or after January 1, 1993. All items of nonbusiness income (income which is not includable in the apportionable tax base) shall be allocated pursuant to the provisions of ORS 314.610 through 314.645 and the rules thereunder. All business income (income which is includable in the apportionable income tax base) shall be apportioned to this state by multiplying such income by the apportionment percentage.

(2) The apportionment percentage is determined by adding the product of the taxpayer's receipts factor as described in section 4 of this rule multiplied by two, to the property factor as described in section 5 of this rule and the payroll factor as described in section 6 of this rule and dividing the sum by 4. If one of the factors is missing, the remaining factors are added and the sum is divided by three (divide by two if the missing factor is the receipts factor). A factor is missing if both its numerator and denominator are zero, but it is not missing merely because its numerator is zero.

(3) *Definitions.* As used in this rule, unless the context otherwise requires:

(a) *"Billing address"* means the location indicated in the books and records of the taxpayer as the address where any notice, statement and/or bill relating to a customer's account is mailed.

(b) *"Borrower or credit card holder located in this state"* shall mean (1) a borrower, other than a credit card holder, that is engaged in a trade or business which maintains its commercial domicile in this state; and (2) a borrower that is not engaged in a trade or business or a credit card holder whose billing address is in this state.

(c) *"Commercial domicile"* means the headquarters of the trade or business, that is, the place from which the trade or business is principally managed and directed.

(d) *"Credit card"* means credit, travel or entertainment card.

(e) *"Credit card issuer's reimbursement fee"* means the receipt a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has

issued a credit card has charged merchandise or services provided by the merchant to the credit card.

(f) *"Financial organization"* is defined in ORS 314.10(4).

(g) *"Loan"* means any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans shall not include: loans representing property acquired in lieu of or pursuant to a foreclosure under section 595 of the Federal Internal Revenue Code; futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; noninterest bearing balances due from other depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items.

(h) *"Merchant discount"* means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit card is accepted in payment for merchandise or services sold to the card holder.

(i) *"Participation"* is an extension of credit in which an undivided ownership interest is held on a *pro rata* basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to

other lenders. The participation may or may not be known to the borrower.

(j) *"Principal base of operations"* with respect to movable property means the place of more or less permanent nature from which movable property is regularly directed or controlled.

(k) *"Real property owned"* and *"tangible personal property owned"* means real and tangible personal property, respectively, (1) on which the taxpayer may claim depreciation for federal income tax purposes, or (2) property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property include land, stocks in goods and real and tangible personal property rented to the taxpayer. Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.

(l) *"Regular place of business"* means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied and used by employees of the taxpayer.

(m) *"Syndication"* is an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

(4) *Receipts Factor.*

(a) *In general.* The receipts factor is determined as provided in ORS 314.665.

(b) *Receipts from the lease of real property.* See OAR 150-314.665(3).

(c) *Receipts from the lease of tangible personal property.*

(A) Except as described in paragraph (B) of this subdivision, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

(B) Receipts from the lease or rental of movable tangible personal property owned by the taxpayer, such as aircraft, rolling stock, water vessels, or mobile equipment, are included in the numerator of the receipts factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state is determined by multiplying the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any movable tangible personal property within this state cannot he determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(d) *Interest from loans secured by real property.*

(A) The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located within this

state and one or more other states, the receipts described in this subdivision are included in the numerator of the receipts factor if more than 50 percent of the fair market value of the real property is located within this state. If more than 50 percent of the fair market value of the real property is not located within any one state, then the receipts described in this subdivision shall be included in the numerator of the receipts factor if the borrower is located in this state.

(B) A loan is secured by real property if 50 percent or more of the principal amount of the loan is secured by real property at the time that the original loan agreement was made.

(C) The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(e) *Interest from loans not secured by real property.* The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state.

(f) *Net gains from the sale of loans.* The numerator of the receipts factor includes net gains from the sale of loans, including participations and syndications. Net gains from the sale of loans includes income recorded under the coupon stripping rules of section 1286 of the Internal Revenue Code.

(A) The amount of net gains (but not less than zero) from the sale of loans secured by real property included in

the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The amount of net gains (but not less than zero) from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

(g) *Receipts from credit card receivables.* The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and receipts from fees charged to card holders, such as annual fees, if the billing address of the card holder is in this state.

(h) *Net gains from the sale of credit card receivables.* The numerator of the receipts factor includes all net gains (but not less than zero) from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (g) of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

(i) *Credit card issuer's reimbursement fees.* The numerator of the receipts factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (g) of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to cardholders.

(j) *Receipts from merchant discount.* The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this state. Such receipts shall be computed net of any card holder charge backs, but shall not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its card holders.

(k) *Loan servicing fees.*

(A) The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(B) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor pursuant to subdivision (e) of this section and the denominator of which is the total amount of interest and

fees or penalties in the nature of interest from loans not secured by real property.

(l) *Receipts from services.* See OAR 150-314.665(3).

(m) *Receipts from investment assets and activities and trading assets and activities.*

(A) Interest, dividends, net gains and other income from investment assets and activities and from trading assets and activities shall be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to: investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; future contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to the investment and trading assets and activities described in subparagraphs (i) and (ii) of this paragraph, the receipts factor shall include the amounts described in such subparagraphs.

(i) The receipts factor shall include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under re-purchase agreements.

(ii) The receipts factor shall include the amount by which interest, net gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed net losses from such assets and activities.

(B) The numerator of the receipts factor includes interest, dividends, net gains and other income from investment assets and activities and from trading assets and activities described in paragraph (A) that are attributable to this state.

(i) The amount of interest, dividends, net gains and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator of the receipts factor is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly booked for tax purposes at a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(ii) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator of the receipts factor is determined by multiplying the amount described in subparagraph (i) of paragraph (A) from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell which are properly booked for tax purposes at a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.

(iii) The amount of interest, dividends, net gains and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency

transactions, but excluding federal funds sold and purchased, attributable to this state and included in the numerator of the receipts factor is determined by multiplying the amount described in subparagraph (ii) of paragraph (A) by a fraction, the numerator of which is the average value of such trading assets which are properly booked for tax purposes at a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(iv) For purposes of this paragraph, average value shall be determined using the rules for determining the average value of tangible personal property set forth in subdivisions (c) and (d) of paragraph (3).

(C) In lieu of using the method set forth in paragraph (B) of this subdivision, the taxpayer may elect, or the department may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this paragraph.

(i) The amount of interest, dividends, net gains and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator of the receipts factor is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly booked for tax purposes at a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(ii) The amount of interest from federal funds sold and purchased and from securities purchased under resale

agreements and securities sold under repurchase agreements attributable to this state and included in the numerator of the receipts factor is determined by multiplying the amount described in subparagraph (i) of paragraph (A) from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly booked for tax purposes at a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(iii) The amount of interest, dividends, net gains and other income from trading account assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book and foreign currency transactions, attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (ii) of paragraph (A) by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly booked for tax purposes at a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

(D) If the taxpayer elects or is required by the department to use the method set forth in paragraph (C) of this subdivision, it shall use this method on all subsequent returns unless the taxpayer receives prior written permission from the department, or the department requires, the use of a different method.

(E) The taxpayer shall have the burden of proving that an investment asset or activity or trading asset or activity was properly booked for tax purposes at a regular

place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside the state. Where the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity shall be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines shall be presumed to be established:

(i) in the case of a taxpayer organized under the laws of the United States or of any state, at the commercial domicile of the taxpayer; or

(ii) in the case of a taxpayer organized under the laws of a foreign country, in the state which the taxpayer has declared to be its home state pursuant to the provisions of the International Banking Act of 1978. If a taxpayer described in this clause has not made such a declaration or is not required to make such a declaration, the asset or activity shall be presumed to be located at the taxpayer's place of business in the United States to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employee are performed, as of the last day of the taxable year.

(n) *All other receipts.* The numerator of the receipts factor includes all other receipts pursuant to the rules set forth under ORS 314.665.

(o) *Attribution of certain receipts to commercial domicile.* All receipts which would be assigned under this section to a state in which the taxpayer is not taxable shall be included in the numerator of the receipts factor, if the taxpayer's commercial domicile is in this state.

(5) *Property Factor.*

(a) *In general.* The property factor is a fraction, the numerator of which is the average value of the taxpayer's real property, tangible personal property, loans and credit card receivables located and used within this state during the taxable year and the denominator of which is the average value of all such property located and used both within and without this state during the taxable year.

(b) *Value of property owned by the taxpayer.*

(A) The value of real property and tangible personal property owned by the taxpayer is the original cost or other basis of such property for federal income tax purposes without regard to depletion, depreciation or amortization.

(B) Loans are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a loan is charged-off in whole or in part for federal income tax purposes, the portion of the loan charged off is not outstanding. A specifically allocated reserve established pursuant to regulatory or financial accounting guidelines which is treated as charged-off for federal income tax purposes shall be treated as charged-off for purposes of this section.

(C) Credit card receivables are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a credit card receivable is

charged-off in whole or in part for federal income tax purposes, the portion of the receivable charged-off is not outstanding.

(c) *Average value of property owned by the taxpayer.* See OAR 150-314.655(2)-(A) and 150-314.655(3).

(d) *Average value of real property and tangible personal property rented to the taxpayer.* See OAR 150-314.655(2)-(B).

(e) *Location of real property and tangible personal property owned by or rented to the taxpayer.*

(A) Except as described in paragraph (B) of this subdivision, real property and tangible personal property owned by or rented to the taxpayer is considered to be located within this state if it is physically located, situated or used within this state.

(B) Movable tangible property, such as aircraft, rolling stock, water vessels, or mobile equipment, are included in the numerator of the property factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of value that is to be included in the numerator of this state's property factor is determined by multiplying the average value of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft everywhere. If the extent of the use of any movable tangible property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle

will be deemed to be used wholly in the state in which it is registered.

(f) *Location of loans.*

(A) A loan is considered to be located within this state if:

(i) it is properly booked for tax purposes at a regular place of business of the taxpayer within this state; or

(ii) in the case of a taxpayer organized under the laws of the United States or of any state, the loan is properly booked for tax purposes at a place which is not a regular place of business of the taxpayer and such taxpayer's commercial domicile is within this state; or

(iii) in the case of a taxpayer organized under the laws of a foreign country, the loan is properly booked for tax purposes at a place which is not a regular place of business of the taxpayer and such taxpayer has declared this state to be its home state pursuant to the provisions of the International Banking Act of 1978. If a taxpayer described in this clause has not made such a declaration or is not required to make such a declaration, the loan shall be presumed to be located at the place in the United States to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employee are performed, as of the last day of the calendar year.

(B) The state in which a loan has a preponderance of substantive contact with a regular place of business of the taxpayer shall be the state in which a loan is properly booked.

(C) In order to determine the state in which loans or credit card receivables are properly booked under the "preponderance of substantive contact" test for the purpose of locating said property under (3)(f)(B), consideration is to be given to such things as: solicitation, investigation, negotiation, approval and administration. The terms "solicitation," "investigation," "negotiation," "approval" and "administration" are defined as follows.

(i) *Solicitation.* Solicitation is either active or passive. Active solicitation occurs when an employee of the taxpayer initiates the contact with the customer. Such activity is located at the regular place of business which the taxpayer's employee is regularly connected with or working out of, regardless of where the services of such employee were actually performed. Passive solicitation occurs when the customer initiates the contact with the taxpayer. If the customer's initial contact was not at a regular place of business of the taxpayer, the regular place of business, if any, where the passive solicitation occurred is determined by the facts in each case.

(ii) *Investigation.* Investigation is the procedure whereby employees of the taxpayer determine the creditworthiness of the customer as well as the degree of risk involved in making a particular agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(iii) *Negotiation.* Negotiation is the procedure whereby employees of the taxpayer and its customer determine the terms of the agreement (e.g., the amount, duration, interest rate, frequency of repayment, currency

denomination and security required). Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(iv) *Approval.* Approval is the procedure whereby employees or the board of directors of the taxpayer make the final determination whether to enter into the agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed. If the board of directors makes the final determination, such activity is located at the commercial domicile of the taxpayer.

(v) *Administration.* Administration is the process of managing the account. This process includes bookkeeping, collecting the payments, corresponding with the customer, reporting to management regarding the status of the agreement and proceeding against the borrower or the security interest if the borrower is in default. Such activity is located at the regular place of business which oversees this activity.

(D) In applying the standards for determining the state to which a loan is to be located, a preponderance of substantive contact shall be presumed, subject to rebuttal, to exist at a taxpayer's regular place of business to which it has been booked, if the loan is approved and administered there.

(g) *Location of credit card receivables.* For purposes of determining the location of credit card receivables, credit card receivables shall be treated as loans and shall

be subject to the provisions of subdivision (g) of this section.

(6) *Payroll factor.*

In general. The payroll factor is determined as provided in ORS 314.660 and the rules thereunder.

OAR 150-314.280(M) (1995)

Other Methods: Limited Application

150-314.280-(M) (1) For taxpayers that are taxable both within and without Oregon, the provisions of ORS 314.280 will ordinarily require apportionment to arrive at a fair and accurate measure of net income from business activity in Oregon. If the taxpayer can show that no unitary relationship exists between its business activities within Oregon and those activities outside Oregon, then the taxpayer may use separate accounting.

(2) If the allocation and apportionment provisions of OAR 150-314.280-(A) to 150-314.280-(N) do not fairly and accurately reflect the net income of the business done within Oregon, based on the taxpayer's business activity within Oregon, the department may require or the taxpayer may request an alternative method of apportionment and the department may approve that method of apportioning all or any part of the net income from the taxpayer's business activity within Oregon:

(3) The request to use an alternative method of apportionment shall be filed in writing with the department. The request must be signed by the taxpayer or the taxpayer's authorized representative and shall be filed

separately from the taxpayer's return. The request shall include a complete explanation of the alternative method as well as an explanation why the apportionment factors in OAR 150-314.280-(A) through OAR 150-314.280-(N) should not be used. Upon receipt of the request, the department will review it and issue a letter either authorizing or denying the request. If denied, the taxpayer can appeal that action as provided in ORS 305.275. An alternative apportionment method may be used only after receiving written authorization from the department. The authorization may be revoked if, upon audit, it is determined that the alternative method does not arrive at a fair and accurate measure of net income from business activity in Oregon. Once an alternative method has been authorized, it shall be used until a request to change is made and approved by the department or until the authorization is revoked in an audit.

(4) Examples of alternative methods of apportionment include:

(a) The exclusion of any one or more of the factors;

(b) The inclusion of one or more additional factors which will fairly and accurately reflect the taxpayer's net income from business activity in Oregon; or

(c) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

OAR 150-305.100-(B) (1986)

Applicable Dates

Administrative rules adopted by the department, unless specified otherwise by statute or by rule, shall be applicable for all periods open to examination.

(2)

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IN THE

Supreme Court of the United States

U.S. BANCORP AND SUBSIDIARIES,
Petitioners,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

The Council On State Taxation (COST) submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.[1]

COST is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. In

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of the Petitioner and Respondent have been obtained and filed with the Clerk of the Court.

that role, COST monitors and works to improve the fairness and rationality of state and local business taxes. COST represents approximately 570 of the largest corporations in the United States, including companies from every Industry segment.

Retroactive tax legislation is one of the most offensive tax realities facing taxpayers today. For a government to ask taxpayers to voluntarily comply with a set of rules, and then change the rules long after the tax period is closed, flies in the face of common sense, good government, and most importantly, the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This case involves a change in Oregon law that was applied to tax periods eight years earlier. Such retroactive legal changes seriously threaten the certainty and finality that underlies an effective functioning tax system. While it may be necessary for laws to be applied retroactively in certain circumstances, an eight year retroactive period should be found to violate Due Process under any circumstance.

During the past decade, numerous states that impose a corporate income tax have attempted, and in most cases succeeded, in subjecting taxpayers to retroactive tax legislation, whether promulgated by statute or regulation. The frequency of such legislation is increasing, and while rarely reviewed, many of the retroactive laws that do end up in court have been upheld as a result of the misapplication of this court's precedent. The tendency of state courts to rubberstamp possibly unconstitutional retroactive tax legislation not only impacts the taxpayers subject to the retroactive provision at issue, but also creates a bad example for other states to follow. Further, frequent retroactive application of new tax laws creates suspicion among taxpayers and reduces respect for the tax system. The failure of state courts to apply the proper Due Process standard to retroactive tax legislation validates and perpetuates the enactment of retroactive tax legislation by states throughout the country.

The proper and permissible application of retroactive tax legislation is the principal issue in this case. Most COST members have been subject to the application of some type of retroactive tax legislation in the conduct of their trade or business. COST members routinely challenge retroactive tax legislation but find a severe lack of consistency in state court decisions based on the varied views of state courts of the Due Process Clause. This lack of consistency is problematic for taxpayers. Because state and local tax structures are informed by U.S. Constitutional principles it is within this Court's purview and responsibility to monitor and guide state courts in applying the proper constitutional limits. It creates extreme uncertainty for the business community where taxpayers crave finality as to their state tax liabilities. Given these considerations, COST members have a substantial interest in developing a uniform and functional standard under which to analyze retroactive tax legislation imposed by state legislatures or taxing authorities. The current state tax regimes, as evidenced by this case, are not serving this interest. COST members both individually and collectively are thus disadvantaged by the inconsistent and impermissible application of retroactive tax legislation.

SUMMARY OF THE ARGUMENT

The United States Supreme Court should grant certiorari and review this case for two compelling reasons: (1) The business community throughout the nation is significantly concerned about the continued inconsistent and frequently incorrect application by state courts of the Due Process Clause standard to challenges brought against retroactive tax legislation, and (2) Under the facts presented in *U.S. Bancorp v. Department of Revenue*, 103 P.3d 85 (Or. 2004), the Oregon Supreme Court incorrectly applied the Due Process Clause standard to the retroactive legislative tax regulation, resulting in a clearly erroneous decision that runs afoul of any of the standards established by the United States Supreme Court and

offends even the most narrow reading of the Due Process Clause.

In the present case the Oregon Supreme Court upheld the Oregon Department of Revenue's application of Or. Admin. R. 150-314.280-(M), which was issued in 1995, to tax years starting in 1988. As applied, the regulation had an eight year retroactivity period and was used by the Department of Revenue to assess almost $10,000,000 in new taxes and interest against U.S. Bancorp by including an additional factor—intangible property—in the taxpayer's income apportionment formula for all tax years that remained open for audit. Because U.S. Bancorp had extended its federal statute of limitations to allow the Internal Revenue Service to conclude its audit process, U.S. Bancorp's tax returns remained open to audit as far back as 1988, well beyond the standard three year statute of limitations that applied to other Oregon taxpayers.

Certain members of the Oregon legislature have become so emboldened by the Oregon Court's decision that sweeping retroactive legislation was recently introduced which would retroactively impose tax on any company doing business in the state to the extent that the company engaged in "reportable" or "listed" transactions. The legislation would grant the State's Department of Revenue authority to administratively define those transactions and then to assess taxes, increased penalties, and intereste as far back as 1995, a ten year retroactive period. S.B. 480, 73rd Sess., Oregon (2005).

ARGUMENT

I. THE BUSINESS COMMUNITY IS CONCERNED ABOUT THE INCONSISTENT AND FREQUENTLY INCORRECT APPLICATION BY STATE COURTS OF THE DUE PROCESS CLAUSE STANDARD FOR CHALLENGING RETROACTIVE TAX LEGISLATION.

The United States Supreme Court should grant certiorari and review this case because of its vast implications beyond the immediate taxpayer and the immediate law at issue. Over the past several decades, state courts throughout the country have reviewed the constitutionality of retroactive tax legislation. These states courts have held similar statutes and regulations valid or invalid under the Due Process Clause of the United States Constitution, depending upon the standard applied by the presiding state court. Though these decisions vary in accordance with divergent facts, the federal constitutional standard applied to retroactive tax legislation challenged under the Due Process Clause should not. Despite this logical premise, however, state courts continue to apply inconsistent constitutional standards and to consider varying factors in their decisions due to the lack of clear guidance on this issue.

During the past ten years, state promulgation of retroactive tax legislation and the length of that retroactivity has increased substantially, creating even more uncertainty for already weary taxpayers.[2] In the absence of clear Supreme

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[2] A few recent examples of the growing trend follow: Massachusetts enacted legislation which provided that dividends received by financial institutions or general business corporations from real estate investment trusts are not treated as dividends for Massachusetts tax purposes. Thus, these entities are not permitted to deduct such amounts as dividends received when determining their Massachusetts corporate excise liability. This legislation is to be applied retroactively to tax years ending on or after December 31, 1999. *See* Mass. S.B. 1949, enacted March 5, 2003.

Court guidance on this issue, taxpayers will continue to suffer the effect of impermissible retroactivity, in violation of the Due Process Clause. This request for certiorari to the Supreme Court provides a prime opportunity for this Court to unambiguously define the correct constitutional standard applicable to Due Process Clause challenges to retroactive tax legislation, which will prevent state courts from continuing to render inconsistent decisions on this important federal issue.

In this particular case, (which is illustrative of many of the situations in other states) the Oregon Supreme Court held that the Oregon Department of Revenue's application of Or. Admin. R. 150-314.280-(M), which was issued in 1995, to tax years starting in 1988, was permissible under Oregon law and the Due Process Clause.[3] Essentially, the Oregon Supreme Court validated a legislative regulation with an eight year retroactivity period.[4] The validation of a retroactivity period of this magnitude is possibly the most aggressive position taken by a state court with respect to Due Process Clause limitations on retroactive tax legislation. Though citing the United States Supreme Court in *United States v.*

North Carolina enacted retroactive legislation that requires a corporation or an affiliated group of corporations that own 70% or more of the capital interests in a limited liability company (LLC) to include in its tax base the same percentage of the LLC's net assets. These provisions were effective retroactively to January 1, 2003. N.C. Laws 2004, Ch. SL 2004-74 (S.B. 51), enacted July 8, 2004. Kentucky enacted H.B. 541, in 2000 as KRS 141.200 (9)-(10) to prohibit the filing of corporate income tax refund claims based on unitary returns filed after December 22, 1994. Pennsylvania amended its definition of business income in 2001, effective retroactively to tax years beginning after 1998. *See* Act 23 (H.B. 334) Laws 2001.

[3] *U.S. Bancorp v. Department of Revenue*, 103 P.3d 85 (Or. 2004).

[4] The eight year retroactive period is a result of Oregon's retroactive application of a newly issued 1995 legislative regulation to U.S. Bancorp's 1988 tax return.

Carlton[5] and *General Motors Corp. v. Romein*[6] to support its decision, the Oregon Supreme Court reached a conclusion that is unparalleled to either case[7] and inconsistent with the highest state courts in other states, which should apply the same constitutional standard.

In stark contrast to the *U.S. Bancorp v. Department of Revenue* decision, the Supreme Court of South Carolina in *Rivers v. State*[8] invalidated the retroactive application of a 1991 statute with a retroactivity period of two to three years due to the excessiveness of its period of retroactivity under federal constitutional standards. Most notably, the retroactivity period at issue in *U.S. Bancorp* exceeds the retroactivity period in *Rivers* by five years, or more than double, yet the Oregon Supreme Court in *U.S Bancorp* upheld Oregon's retroactive legislation, while the South Carolina Supreme Court invalidated South Carolina's retroactive statute in *Rivers*.

Similarly, the Supreme Judicial Court of Massachusetts in *Keniston v. Board of Assessors*[9] struck down a 1979 statute with a three year retroactivity period by ruling that it was constitutional but only as applied to fiscal years after 1979. The Supreme Judicial Court of Massachusetts interpreted the three year period of retroactivity to be excessive under federal constitutional standards and it adopted a one year retroactivity period in its place. Contrasting the decisions in *Rivers* and *Keniston*, the Supreme Court of Illinois in *General Telephone*

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[5] *United States v. Carlton*, 512 U.S. 26 (1994).

[6] *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

[7] This proposition will be discussed in extensive detail in the second part of the argument.

[8] *Rivers v. State*, 490 S.E.2d 261 (1997).

[9] *Keniston v. Board of Directors of Boston*, 380 Mass. 888 (1980).

Company of Illinois v. Johnson[10] upheld under the federal constitutional standards the retroactive application of a 1982 Public Act with a period of retroactivity ranging from two to three years. The conflicting state supreme court decisions in Oregon, South Carolina, Massachusetts and Illinois evidence the strong need for intervention by the United States Supreme Court to dictate a precise standard and prevent the continued development of inconsistent case law.

The state supreme courts decided *Keniston* and *General Telephone Company of Illinois* prior to the United States Supreme Court's decision in *United States v. Carlton.*[11] However, even after the Supreme Court decided *Carlton*, the federal constitutional standard applied by Oregon and South Carolina in *U.S Bancorp* and *Rivers*, respectively, to evaluate the Due Process Clause claim still resulted in inconsistent decisions on this important federal constitutional issue. Given the increasing frequency of state enactment of retroactive tax legislation, the United States Supreme Court should seize this opportunity to provide unambiguous guidance on the proper constitutional standard for testing the constitutionality of retroactive tax legislation.

II. THE OREGON SUPREME COURT INCORRECTLY CONCLUDED THAT OR. ADMIN. R. 150-314.280-(M) IS CONSTITUTIONAL AS RETROACTIVELY APPLIED TO U.S. BANCORP.

A. Or. Admin. R. 150-314.280-(M) is a legislative regulation.

Classifying a regulation as legislative or interpretive is significant for determining its precedential value and the constitutionality of its retroactive application. The Oregon Tax

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[10] *General Telephone Company of Illinois v. Johnson, Director of Revenue*, 103 Ill. 2d 363 (1984).

[11] *United States v. Carlton*, 512 U.S. 26 (1994).